83-388

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

E-SYSTEMS, INC.,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

HOWARD R. CLYMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is any statutory requirement under the Longshoremen's and Harbor Workers' Compensation Act for a claimant, who is permitted to recover on a theory that the employment conditions of diet and climate aggravated pre-existing diabetes and hypertension, to prove the occurrence of an accidental injury or occupational illness which arose out of and was caused by the employment. (33 U.S.C. §902(2)).

2. Whether the statutory presumption under 33 U.S.C. §920(a) can properly be applied in the claimant's favor, when there was substantial evidence of record before the Court below to rebut the statutory presumption and affirm the findings of the Administrative Law Judge and Benefits Review Board that the claimant's diabetes and hypertension did not arise from and were not caused by the employment and that the claimant failed to prove disability.

3. Whether the Court of Appeals may permit recovery based upon a claim of aggravation of pre-existing hypertension and diabetes when such claim was not asserted by the claimant who contended an occupational illness under the Act which was denied by the Administrative Law Judge and Benefits Review Board. (33 U.S.C. §902(2)).

4. Whether the Court of Appeals erred in reversing the findings and decision of the Administrative Law Judge that the claim under the Longshoremen's and Harbor Workers' Compensation Act was barred by the failure to comply with the thirty (30) day notice requirement and one year statute of limitations requirement under the Act, 33 U.S.C. §§912(a), 913(a).

PARTIES BELOW

In the Court below, the Petitioners were Respondents. The Respondent Howard Clymer was Petitioner in the Court below and Respondent Director, Office of Workers' Compensation Programs, United States Department of Labor, was Respondent in the Court below.

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and

HOWARD R. CLYMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, E-SYSTEMS and LIBERTY MUTUAL INSURANCE COMPANY respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The decision of the Court of Appeals, denying the Petition for Rehearing and Suggestion for Rehearing En Banc dated June 14, 1983 is set forth as Appendix A hereto. The Court of Appeals decision of December 2, 1982 is unreported and is attached hereto as Appendix B. The decision of the Benefits Review Board with dissent is set forth as Appendix C hereto. The decision of the Administrative Law Judge is attached hereto as Appendix D. The form LS/203 claim for compensation is attached hereto as Appendix E.

JURISDICTION

The decision of the Court of Appeals was entered on December 2, 1982. The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered on June 14, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code, Title 33

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, as extended by the Defense Base Act, 42 U.S.C. §1651.

§902. *Definitions*

When used in this chapter —

* * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such

employment or as naturally or unavoidably results from such accidental injury and includes any injury caused by the willful act of a third person directed against an employee because of his employment.

* * * *

(10) Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

§903. *Coverage*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury . . . .

§912. *Notice of Injury or Death*

(a) Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty (30) days after the date of such injury or death, or thirty (30) days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given (1) to the deputy commissioner in the compensation district in which the injury occurred, and (2) to the employer.

§913. *Filing of Claims*

(a) Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a

claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

§920. *Presumption*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —

(a) That the claim comes within the provision of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

§921. *Review of Compensation Orders*

* * * *

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact and the decision under review by the Board shall be conclusive if supported by substantial evidence and the Record considered as a whole.

STATEMENT OF THE CASE

This is an occupational illness case — it being claimed that diet and climate caused, or in the alternative aggravated a pre-existing condition so as to cause, hypertension and diabetes.

Under its contract with the United States Government, in 1976 E-Systems was constructing the Sinai Field Mission in the Sinai. The weather in the Sinai was described as similar to Dallas, Texas and the housing facilities were heated and air conditioned. The meals were American style and were served in a cafeteria and the employees were free to eat whatever they chose, however, E-Systems did accommodate special diet requests and some employees cooked their own food.

Mr. Clymer arrived at the Sinai Field Mission in late June, 1976 as a heating and air conditioning mechanic and worked six days a week for three weeks and was then given one week of rest and recuperation (R & R). Mr. Clymer testified he started feeling exhausted and having headaches in August of 1976, and on December 7, 1976 he complained of numbness in his right leg, right arm and right side of his face and reported nausea and was given pills at the dispensary. He was hospitalized by Israeli doctors for one week in December, 1976, and released to his regular duties with no restrictions. He had a recurrence of these complaints in late spring of 1977 while at a Tel Aviv hotel on R & R, but did not see any doctors and had a similar attack again while on R & R in Tel Aviv while shopping in a department store on or about January 29, 1978. He was hospitalized in late January or early February of 1978 for approximately twelve (12) days and while the doctors felt he could return to work initially for half days Mr. Clymer decided to return to the United States to be examined by his own doctor. The Israeli doctor's report of February 9, 1978 regarding his hospitalization in Israel notes (1) essential hypertension, (2) strain of myocardium, and (3) cirrhosis of the liver and that Mr. Clymer was overweight and should stop drinking.

On or about April 13 or 14, 1978 Mr. Clymer first reported to his employer he had sustained an occupational illness, i.e., hypertension and diabetes while employed in the Sinai because of diet and weather. His claim for compensation based on an occupational illness (Form LS/203), dated August 16, 1978 was received by the Office of Workers' Compensation Programs—Houston on August 21, 1978. At no time did Mr. Clymer claim an aggravation of a pre-existing condition and in fact his claim for compensation stated that prior to his employment in Israel he was in good health. (See Appendix E.)

To support his claim of an occupational illness, to wit, hypertension and diabetes caused by diet and climate, at the hearing before the Administrative Law Judge (A.L.J.) Mr. Clymer submitted reports of Dr. Dunn. In his report of April 13, 1978, Dr. Dunn noted hypertension and possible diabetes and in a report of July 18, 1978 he notes that his hypertension and diabetes are controlled by diet and oral medication and he could be considered employable if a neurological evaluation proved negative. A subsequent neurological evaluation by Dr. Black indeed proved negative. In his report of August 7, 1978 Dr. Dunn expressed that the intermittent high blood pressure or hypertension was mostly normal, the diabetes mellitus should be totally controlled by diet and the episodes of numbness may be due to transient ischemic attacks, however, further evaluation was necessary. (See Appendix D.)

Petitioners offered as a witness at the hearing before the A.L.J., Dr. Robert L. North, Chief of Internal Medicine at Presbyterian Hospital in Dallas, Texas and a Board certified specialist in cardiovascular and internal medicine who had been practicing medicine since 1955. He not only examined Mr. Clymer but reviewed his medical history, and the examination proved essentially normal. Dr. North referred Mr. Clymer to Dr. Black for a neurological evaluation including a brain scan which proved normal. Dr. North conducted blood sugar tests, and obtained the results of glucose tolerance tests and blood pressure

readings from Dr. Dunn, and further reviewed Dr. Spitzberg's stress test which proved negative. Dr. North testified that his impression was that Mr. Clymer had some venous insufficiency and intermittent elevations of blood pressure and mild diabetes which were both controlled by diet and there was no organic explanation or basis for his complaints. He testified that Mr. Clymer's intermittent hypertension and mild diabetes were not job related or caused by the diet or climate, as claimed by Mr. Clymer, and that there was no physical impairment which would preclude his returning to employment; that diabetes is an abnormality in sugar metabolism most likely due to an insufficiency in the secretion of insulin and is most probably inherited; that hypertension and diabetes were common in a man of his age; that neither the geographic location, occupation or diet with E-Systems had anything to do with these conditions; that if Mr. Clymer stayed in Texas and ate the same diet, in all likelihood he would have developed the same problems; that diabetes is not caused by the diet, and that exercise is good for one with diabetes. (See Appendix D.) There was evidence of some intoxication on the part of Mr. Clymer during his employment and Dr. North testified that excessive consumption of alcohol, just like obesity and age were factors which could contribute to hypertension or diabetes. He testified that diet or environmental factors may aggravate or have an effect upon diabetes or hypertension, but after extensive cross-examination, Dr. North stated that "there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for . . . hypertension or diabetes;" that "the location, the climate [i.e., the Sinai] . . . are purely accidental in this case and had he remained in South Texas and that had he been given the same diet, the same . . . problems with the IRS, however much he drank drinking the same, he would have developed the same problems at the same time. In that respect it is his destiny." Dr. North concluded that ". . . the geographic location and occupation in my opinion have nothing to do with the appearance of high blood pressure or diabetes mellitus in this case . . . ." (See Appendix D.)

The case was tried before the Honorable David W. DiNardi, an Administrative Law Judge (A.L.J.) who found as a fact that Mr. Clymer had failed to prove an accidental injury or occupational illness caused by the employment under 33 U.S.C. §902(2). (See, Appendix D.) The A.L.J. also found as a fact that Mr. Clymer had failed to prove that he had sustained any disability, and that his claim was barred by failure to give his employer notice of the claim within thirty (30) days and failure to file his claim for compensation within one year from the date he knew or should have known that his problem was work related. (See, Appendix D.) The decision of the A.L.J. was affirmed by the Benefits Review Board, primarily upon the lack of a causal connection between the employment and the alleged occupational illness. (See Appendix C.) The Court of Appeals for the Fifth Circuit reversed the decisions of the Benefits Review Board and A.L.J., asserting that the A.L.J.'s decision was contrary to law because notwithstanding the A.L.J.'s finding of a lack of causal connection between the employment and the occupational illness, causality is not a necessary element in an aggravation case. The Court of Appeals held that although the A.L.J. accepted the testimony of Dr. North that Mr. Clymer's hypertension and diabetes were not caused by the employment, nevertheless since Dr. North testified that diet and environment may aggravate these conditions, this was sufficient to establish an aggravation of a pre-existing condition and thus a compensable condition under the Act. (See Appendix B.) The Court of Appeals also reversed the findings of the A.L.J. that the claimant failed to prove disability, reasoning that the Employer had not sufficiently established a lack of disability. Finally, the Court of Appeals reversed the A.L.J.'s decision that Mr. Clymer's claim was barred by failure to comply with the thirty (30) day notice and one year statute of limitations filing requirements under §§912a and 913a of the Act.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals for the Fifth Circuit Below is in Direct Conflict with the Rule of Law of *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor,* U.S. , 102 S.Ct. 1312 (1982)

The lower Court has implicity held that in an aggravation case a claimant is not required to prove that he sustained an accidental injury or occupational illness which arose out of and was caused by the employment, it being sufficient to be compensable if any condition of the employment had any aggravating effect on the diabetes and hypertension.

This holding of the lower Court of Appeals that causation is not a necessary requirement is contrary to the specific wording of the Act as well as this Honorable Court's decision in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor,* U.S. , 102 S.Ct. 1312 (1982), which held:

> "Section 3(a) provides that '[C]ompensation shall be payable only under [the Act] in respect of disability . . . of an employee, but only if the disability . . . results from an injury'. 33 U.S.C. §903(a). Injury is defined as an 'accidental injury . . . arising out of and in the course of employment '. §902(2). Arising 'out of ' and 'in the course of' employment are separate elements: the former refers to injury causation; the latter refers to the time, place,and circumstances of the injury. *Not only must the injury have been caused by the employment,* it must also have arisen during the employment." (Emphasis added.)

This case was decided after oral argument in the Court below and is not cited in the Fifth Circuit's opinion. The Court of Appeals does not appear to disturb the findings of a lack of causal connection between the employment and the illness, but has erased the requirement of a casual connection between the employment and the condition in an aggravation case. While Dr. North did not deny that it was possible that conditions such as heat and diet could have an effect upon diabetes and hypertension, Dr. North testified that "there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for . . . hypertension or diabetes" that "the location, the climate . . . are purely accidental in this case and had he remained in South Texas and that had he been given the same diet, the same . . . problems with the IRS, however much he drank drinking the same, he would have developed the same problems at the same time. In that respect it is his destiny." Dr. North concluded that ". . . the geographic location and occupation in my opinion have nothing to do with the appearance of high blood pressure or diabetes mellitus in this case . . . ."

The A.L.J. accepted this testimony of Dr. North, and the Benefits Review Board affirmed. Nevertheless, the lower Court of Appeals placing exaggerated emphasis upon the doctor's use of the word aggravation substituted its own judgment for that of the Benefits Review Board and the A.L.J. and found that Mr. Clymer had established that his employment had aggravated his condition and it was therefore compensable. Indeed, prior Fifth Circuit holdings have held that there is no requirement of proof of a causal connection between the employment and the injury, *Southern Stevedoring & Co. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949), which was inferentially overruled by the recent pronouncement by the United States Supreme Court in *U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, supra.*

The term "injury" under the Act has traditionally covered three types of incidents: First, an unexpected event which causes

damage or harm to the physical body, such as a fall, *Southern Stevedoring & Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949); an accidental injury which aggravates a pre-existing condition and combines with it so as to cause the new condition, *Hoage v. Employers Liability Assurance Corp.*, 64 F.2d 715 (D.C. Cir. 1933); or an occupational illness which means an illness caused by hazards peculiar to the employment, *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir. 1939), cert. denied, 308 U.S. 70. All three types of injury require a causal connection with the employment. We are not here dealing with the first type of sudden event injury. Mr. Clymer's claim was that he had sustained an occupational illness, the third type of injury, which of course was rejected by the A.L.J. and the Benefits Review Board. The A.L.J. accepted the testimony of Dr. North and found as a fact that the claimant's hypertension and diabetes did not constitute an occupational illness, as these conditions were not caused by hazards peculiar to the employment. These conditions were ordinary diseases of life to which the general public is exposed. There was no effort by the claimant to establish an accidental injury, as his case was presented on a theory of an occupational illness. The Court of Appeals departed from *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation, United States Department of Labor, supra* in two respects: First, as previously argued, in failing to require the claimant to prove an accidental injury or occupational illness *caused* by the employment; and second, in permitting a recovery based upon a theory of an aggravation of a pre-existing condition, when the claim before the A.L.J. and Benefits Review Board was based upon an occupational illness. Regarding the second point the lower Court permitted recovery on a theory not advanced by the claimant. There was never any contention of pre-existing hypertension or diabetes by Mr. Clymer, indeed the claimant denied any such pre-existing problems in his testimony before the A.L.J. Nevertheless, contrary to *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation, United States Department of Labor, supra*, the Court permitted a recovery on a claim — aggravation of a pre-existing condition — which was never advanced by the claimant, who always based his claim on an occupational illness.

II.

The Court of Appeals for the Fifth Circuit Has Decided an Important Federal Question Which Has Not Been, But Should Be, Settled by This Court

This case is of importance to the administration of numerous claims under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 et. seq.) and its extensions. [i.e., Defense Base Act. 42 U.S.C. §§1651-1654; Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173; Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343, and the District of Columbia Workers' Compensation Act, 33 D.C. Code 501, et. seq.]

The interpretation by the lower Court of "injury," which heretofore was limited to an accidental injury or occupational illness arising out of and caused by the employment, will bring workers' compensation into traditional nonoccupational and ordinary illnesses or injuries such as colds, viruses, heart attacks and death from conditions of aging. Under the lower Court's decision, so long as any condition of the work has any effect upon such ordinary diseases, an employee can demonstrate a compensable injury without any proof of either an accidental injury or occupational illness caused by the employment. It may be an aggravation for an employee with a cold to walk to a flight of stairs at work, but does this mean that to recover in an aggravation case a claimant does not have to prove an accidental injury or occupational illness caused by the employment? (33 U.S.C. §902(2)).

The important federal question raised herein should be resolved by this Court. A court must affirm a decision if the facts found by the A.L.J. are supported by substantial evidence in the record considered as a whole, if they are not irrational and if the decision is in accordance with the law. See, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1965); *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1005 (5th Cir. 1978).

The fact finder, i.e., the A.L.J., is to determine the credibility of medical witnesses, *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and the fact finder may accept or reject testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

The reviewing court may not reweigh evidence, but only determine if there is substantial evidence supporting the findings, *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), aff'd, 309 U.S. 251 (1940). The court may not substitute its own judgment for that of the fact finder as to work relatedness, if the finding is supported by substantial evidence. *Newport News Shipbuilding and Drydock Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 583 F.2d 1273 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979). In reversing the decisions of the A.L.J. and Benefits Review Board, it appears the Fifth Circuit does not disturb the findings of the A.L.J. and the Benefits Review Board that Mr. Clymer's diabetes and hypertension were not caused by an on-the-job accidental injury or occupational illness. If this is so, its opinion is contrary to *U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, supra*. If the lower Court's opinion is construed as reversing the findings of the A.L.J. and Benefits Review Board "on causality" because the diabetes and hypertension may have been "aggravated" by the employment, then it is submitted the Court of Appeals improperly substituted its judgment for that of the fact finder. There was no evidence in this case of an accidental on-the-job injury which aggravated the claimant's diabetes or hypertension nor was there any evidence sufficient to establish an occupational illness, which requires exposure to a hazard peculiar to the employment. *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir. 1939), cert denied, 308 U.S. 70. The lower Court has erroneously utilized the "aggravation" evidence to change the claimant's theory, reweigh the evidence and substitute its judgment for that of the fact finder. *Groom v. Cardillo*, 119 F.2d 697, 698 (D.C. Cir. 1941). The A.L.J. applied

every presumption in favor of the claimant but found as a fact his diabetes and hypertension were not caused by the employment nor was Mr. Clymer exposed to any hazards more peculiar than those ordinary hazards of life to which the public is exposed. The decision is supported by substantial evidence, to wit, the testimony of Dr. North which the A.L.J. accepted. When a lower court improperly substitutes its judgment for that of the fact finder, this Court has reinstated the decision of the Benefits Review Board and A.L.J. *U.S. Industries Sheet Metal Inc. v. Director, Office of Workers' Compensation, United States Department of Labor, supra*; *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The Court of Appeals also reversed the A.L.J.'s findings that the claimant had failed to prove disability. The A.L.J. relying upon the medical opinions of Dr. North, Dr. Black, Dr. Spitzberg, and even the claimant's doctor, found that since the claimant had failed to demonstrate any injury or illness induced disability, the burden had not shifted to the employer to demonstrate the availability of work. *See, Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978), which holds that . . . "[O]nce the claimant demonstrates his disability . . ." the burden shifts to the employer to demonstrate the availability of work that the injured employee can perform. *Id.* at 1007. This finding that Mr. Clymer had failed to demonstrate any disability is supported by substantial medical evidence of at least three doctors, yet the lower court held that since there was no showing by the employer of available work and wages which could be earned, the findings of no disability should be set aside. This is an impermissible shifting of the presumption which has traditionally required the claimant prove a compensable injury caused some disability before the burden of showing the availability of work would shift to the employer. *See, Diamond M. Drilling Co. v. Marshall, supra*; *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

III.

To Insure Proper Scope of Judicial Review in Accordance with Established Court Precedent

Although the lower Court acknowledged its scope of review was limited to a determination of whether or not there was substantial evidence in the record as a whole to support the A.L.J.'s conclusion that Mr. Clymer did not sustain an accidental injury or occupational illness or disability caused by the employment, as previously submitted, it failed to properly apply this standard of review and substituted its own judgment for that the trier of fact. The panel also set aside the A.L.J.'s findings as to work relatedness which it is bound to accept if it is consistent with law and support by substantial evidence in the record and considered as a whole.

Finally the Court of Appeals erred in reversing the A.L.J.'s findings that the claim was barred by the thirty (30) day notice and one year statute of limitation requirements under the Act. (33 U.S.C. §§912a, 913a.) The A.L.J. found as a fact that Mr. Clymer was told by an Israeli doctor that he had hypertension on December 7, 1976 and since his employer was not notified of the claim until mid-April, 1978, and the claim was not filed until August 21, 1978, it was barred under §§912(a) and 913(a) of the Act. The lower court reversed, holding that since Mr. Clymer was not told by his doctor, Dr. Dunn, until April, 1978, his condition was potentially work related, his claim was not barred.

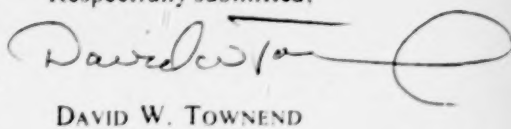
While the Benefits Review Board has typically required that these limitation periods will not commence until the employee is told by a doctor his condition is work related, *Stark v. Lockheed Shipbuilding Co.*, 5 B.R.B.S. 186, B.R.B. Nos. 75-253 (December 8, 1976), the legal test is when the employee knew or should have known the condition was work related. The lower Court has effectively held the test in all cases is when was the employee told by a doctor his condition was work related. This is not the test enacted by Congress and the lower Court erred in

requiring such evidence and reversing these findings of the A.L.J. that the claim was barred for failure to comply with §§912(a) and 913(a) of the Act.

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit has been mailed to all attorney of record and to the Solicitor General, Department of Justice, Washington, D.C., on this 29 day of August, 1983.

DAVID W. TOWNEND

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4310

U.S. COURT OF APPEALS
FILED
JUN 14 1983
GILBERT F. GANUCHEAU
CLERK

HOWARD R. CLYMER,

Petitioner,

versus

E-SYSTEMS, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

- - - - -
Petition for Review of an Order of the
Benefits Review Board
- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 2, 1982, 5 Cir., 1982, _____F.2d____).

(JUNE 14, 1983)

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Henry A. Politz
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

REHG-6

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-4310

HOWARD R. CLYMER,

Petitioner,

versus

E-SYSTEMS, Employer, and
LIBERTY MUTUAL INSURANCE
COMPANY, Insurance Carrier,
and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of an Order of the
Benefits Review Board

(DECEMBER 2, 1982)

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Howard R. Clymer seeks review of a decision by the Benefits Review Board (BRB) of the United States Department of Labor under the Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901, as extended by the Defense Base Act, 42 U.S.C. § 1651. The BRB, one member dissenting, upheld an Administrative Law Judge's (ALJ) denial of benefits, opining that the evidence failed to establish a causal connection between Clymer's employment and his physical condition. Finding an erroneous application of the LHWCA, we reverse the denial of benefits and, because of insufficient factual findings on the extent of disability, remand for further proceedings.

Context Facts

In June 1976, Clymer, then 47 years old, was employed by E-Systems, Inc. as a heating and air-conditioning mechanic for work in the Sinai Field Mission, an early warning system located in the Gideon-Mitla passes in the Sinai Peninsula.[1] Clymer then suffered no symptomatic medical problems, and an employment physical apparently disclosed none.

Upon his arrival in Israel, Clymer began working substantially, if not principally, on tasks other than those typically associated with heating and air-conditioning work. His initial assignments involved manual labor and construction work. Clymer's work attitude and efforts met with the approval of his superiors who commended him. He apparently worked hard.

In August 1976 Clymer began to experience difficulties. The first manifestation was a chronic sense of exhaustion. By the following December he suffered nausea and the onset of numbness of the right leg, right arm and right side of his face. He reported to the paramedics who gave him pills. He was subsequently hospitalized and his condition was diagnosed as transient hypertension with possible cerebral ischemia. He returned to work but continued to be troubled by intermittent headaches and bouts of nausea. In May 1977 Clymer returned home for a visit but sought no medical treatment. In June 1977 he went back to the Sinai after signing on for a second year of duty.

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1. See Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982).

In January 1978, Clymer was hospitalized for 12 days. The following month he returned home to seek medical treatment. His employment by E-Systems was terminated in March 1978.

In August 1978 Clymer filed for benefits under the LHWCA. In denying benefits the ALJ concluded that Clymer had failed to provide his employer with timely notice of the claim as required by 33 U.S.C. § 912(a), failed to file his claim within one year as required by 33 U.S.C. § 913(a), and failed to establish a causal link between his employment and the disability asserted.

The evidence before the ALJ included reports from Dr. John Dunn, Clymer's family physician, together with reports or testimony from other doctors to whom Clymer was directed for examination. Dr. Dunn stated that Clymer was disabled due to hypertension and diabetes mellitus. He concluded that work conditions, environment and diet were contributing causes of these difficulties.

Dunn's medical opinion was challenged in part by Dr. Robert L. North, a physician with impressive professional credentials. Dr. North agreed with the diagnosis of hypertension and diabetes, but testified that neither disorder was caused by Clymer's work in the Sinai, climatic conditions there, or diet. Dr. North was of the opinion that Clymer would likely have suffered the same debilitating difficulties even if he had not left Dallas. He believed the condition to be controllable through diet and medication and found Clymer's thus controlled.

The ALJ credited Dr. North's testimony in finding that E-Systems had successfully rebutted the Section 20(a)

presumption of causality[2] and in finding that Clymer's condition was not aggravated by employment related factors. The BRB affirmed, addressing only the aggravation issue. It concluded that Dr. North's testimony constituted substantial evidence to rebut the statutory presumption. The dissenting member was of the opinion that the employer had not rebutted the statutory presumption of compensability and that Clymer's diet and work environment aggravated a pre-existing condition.

Causality and Aggravation

The scope of our review is limited -- we simply determine whether there is substantial evidence on the record as a whole to support the ALJ's conclusion that the employment environment did not aggravate Clymer's condition. That measure of evidence is defined as "'a substantial basis of fact from which the fact in issue can be reasonably inferred . . . .'" Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1006 (5th Cir. 1978) (quoting NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 299-300 (1939)). See Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008 (5th Cir. 1981), cert. denied, 102 S.Ct. 633

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2. The statutory presumption of compensability, which appears at section 20(a) of the Act, 33 U.S.C. § 920(a), provides as follows:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary --
> (a) that the claim comes within the provisions of this Act.

This presumption "applies as much to the nexus between an employees' malady and his employment activities, as it does to any other aspect of a claim." Swinton v. Kelly, 554 F.2d 1075, 1082 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).

(1982); Todd Shipyards, Inc. v. Fraley, 592 F.2d 805 (5th Cir. 1979); Watson v. Gulf Stevedoring Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).

We are persuaded that the conclusion of the ALJ, upheld by the BRB, on the issue of aggravation is not supported by the quantum of evidence required. Although we have examined the entire record, we need not look beyond the testimony of Dr. North, upon which the ALJ principally relied, in overturning the BRB's decision. Dr. North testified that Clymer's medical problems, hypertension and diabetes, were "things which may be aggravated by dietary and even environmental influences," although they would not be caused by such. There is no contrary evidence in the record. The medical opinion as to aggravation of a pre-existing condition is thus uncontradicted.

If an employee is able to show that employment conditions aggravated a pre-existing condition resulting in disability, the LHWCA provides benefits commensurate with the disability. Fulks v. Avondale Shipyards, Inc.; Newport News Shipbuilding & Dry Dock Co. v. Director, 583 F.2d 1273 (4th Cir. 1978), cert. denied,440 U.S. 915 (1979); Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). We conclude that Clymer is entitled to benefits for a disabling work-related aggravation of a pre-existing condition.

Disability -- Extent of Benefits

The ALJ found that Clymer suffered no disability.[3] In reaching this conclusion the ALJ credited the testimony of

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3. Disability "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10).

Dr. North, who examined Clymer in April 1979, 14 months after he had returned from the Sinai and undergone a course of treatment by Dr. Dunn. Dr. North could find no physical impairment which would preclude Clymer's return to his prior employment. The ALJ credited Dr. North's testimony that the hypertensive and diabetic conditions were being controlled by diet and medication, and the medical opinion of two other doctors who stated that Clymer's neurological examination was within normal limits and that there was no evidence of organic disease.

We find no medical evidence offered by E-Systems addressing the question whether Clymer's condition prevented him from earning comparable wages prior to the time his condition improved due to diet and medication. The only evidence on this point is found in the reports of Dr. Dunn. On April 13, 1978, Dr. Dunn reported that Clymer was unable to work, a condition which would continue indefinitely. In a subsequent report, Dr. Dunn stated that if a neurological examination proved negative, Clymer would be considered employable. That examination, as noted above, was negative; however, Dr. Dunn advised Clymer against returning to work. In a letter dated August 28, 1979, Dr. Dunn stated that Clymer's condition remained the same, with the exception that his blood sugar level was normal. "The same" was not further defined and no explanation was offered for his advice to Clymer that he defer returning to work.

The ALJ's findings do not provide a sufficient basis for an evaluation of the extent of Clymer's disability claim. There are no findings relative to Clymer's symptoms, including fainting, periods of semi-consciousness and numbness, and how these would bear upon a finding of total

temporary, permanent partial, or temporary partial disability. The evidence of record points to the existence of a period of disability, however, we are unable to fathom how much or how long. We must remand for further findings on the issue of disability.

Statute of Limitations

Under Section 913(a) of the Act, a claim under the LHWCA is time-barred unless it is filed within one year after an employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. The ALJ found that Clymer was aware that he had intermittent labile hypertension on December 7, 1976 and therefore his claim, filed August 21, 1978, was not timely. The ALJ made no finding, however, that Clymer was told in December 1976 that his condition was employment related.

The ALJ's finding is not supported by substantial evidence. Although aware from late 1976 that he had some sort of affliction, it appears that the first time Clymer had reason to suspect his condition was employment related was in April 1978, after he received Dr. Dunn's diagnosis. See Fulks v. Avondale Shipyards, Inc., 637 F.2d at 1012 ("the period 'begins to run when the employee knows, or reasonably should know, that his condition . . . arose out of his employment'"). Clymer's claim was therefore timely filed.

Under section 912(a), Clymer was required to give notice to E-Systems within 30 days. This requirement was also satisfied -- an E-Systems employee testified that the

company received notice of Clymer's claim in April 1978. We therefore conclude that the ALJ's finding that Clymer failed to comply with the LHWCA's time and notice requirements, which finding the BRB did not address, is not supported by substantial evidence.

REVERSED and REMANDED for further proceedings nsistent herewith.

APPENDIX C

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

PUBLISHED

No. 79-766

FILED AS PART OF THE RECORD

JUN 11 1981

(date)

Agnes Kurtz Jr.

Clerk
Benefits Review Board

HOWARD CLYMER

Claimant-Petitioner

v.

E-SYSTEMS

and

LIBERTY MUTUAL INSURANCE COMPANY

Employer/Carrier-Respondents

DECISION and ORDER

Appeal from the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Samuel L. Boyd (Kelsoe & Ayres), Dallas, Texas for the claimant.

John W. Payne and David Townend (DeHay & Blanchard), Dallas, Texas, for the employer.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by claimant from the Decision and Order (79-LHCA-1644N) of Administrative Law Judge David W. DiNardi pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended to the Defense Base Act, 42 U.S.C. §1651 et seq. (hereinafter, the Act). This case involves the issue of whether claimant's hypertension and diabetes mellitus were either

*Dissent by MILLER, Administrative Appeals Judge, to follow.

caused or aggravated by working conditions and his diet while working in Israel for employer.

In June 1976, claimant, a mechanic, was hired by E-Systems (hereinafter, employer) and sent to employer's Sinai Mission Field in Israel. On December 7, 1976, after experiencing numbness and nausea, claimant was hospitalized. A diagnosis of transient hypertension with possible cerebral ischemia was made; however, causation was not established. Cl. Ex. 4, Res. Ex. 7. Following his hospitalization, claimant returned to work and continued to experience intermittent attacks of headaches and nausea. Claimant again was hospitalized in January 1978, and he subsequently returned to the United States for further medical evaluation. Upon his return, in February 1978, claimant was examined by his family physician, Dr. John Dunn. In a report dated April 13, 1978, Dr. Dunn concluded that claimant was unable to return to work due to hypertension and possible diabetes mellitus. Cl. Ex. 10. In a report dated August 28, 1978, Dr. Dunn attributed claimant's condition in part to the work conditions and diet in Israel.

Claimant filed under the Act in August 1978, and employer controverted. Subsequent to a hearing, the administrative law judge denied benefits. He found that claimant failed to provide employer with timely notice of injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a). He further found the claim barred by Section 13, 33 U.S.C. §913. Assuming arguendo that the claim was timely, the administrative law judge found no causal connection between claimant's condition and his

employment. Section 2(2), 33 U.S.C. §902(2). Claimant appeals the decision of the administrative law judge, urging reversal of these findings.

On the issue of causal connection, the record contains conflicting medical opinion. Dr. John Dunn, claimant's treating physician, opined, in a report dated August 28, 1978, that claimant's work conditions and diet were both contributing causes to his hypertension and diabetes. Dr. John North, however, testified that neither of these conditions may be attributed to claimant's occupation, geographic location, work environment or diet. In Dr. North's opinion, claimant would have developed the same impairments had he remained in Texas. He denied that the manual labor required of claimant in his job aggravated these conditions. Moreover, Dr. North considered claimant's age, overweight, and heavy alcohol use as factors aggravating his conditions.

In a detailed and well reasoned opinion, the administrative law judge found that employer had rebutted the Section 20(a) presumption of causal connection. The administrative law judge credited the testimony of Dr. North and found that claimant's hypertension and diabetes mellitus would have occurred irrespective of his employment. Moreover, the administrative law judge found that these conditions were not aggravated by claimant's employment, work environment or diet. He credited testimony that employer provided cafeteria-style meals, designed to approximate the American-type diet, that special food items could be prepared for workers at their request, and that it was possible for individuals to do their own cooking.

The factfinder is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The testimony of Dr. North not only constitutes substantial evidence to rebut the presumption, but also constitutes substantial evidence to support the administrative law judge's finding that claimant's condition is not causally related to his employment. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Accordingly, we affirm the administrative law judge's denial of benefits on the basis of the lack of causal connection. We do not reach the other issues appealed.

SO ORDERED.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

I Concur:

EDWARD W. KALAVITZ
Administrative Appeals Judge

Dated this 11th day
of June 1981

SERVICE SHEET

RE: [illegible] Howard T. Clymer vs. [illegible] and Liberty Mutual Insurance Company (Case No. [illegible]) ([illegible])

Notices were sent to the following:

[illegible] Certified

[illegible] Certified

[illegible] Certified

[illegible]

[illegible]

[illegible]

U.S. Department of Labor

Benefits Review Board
1111 20th St. N.W.
Washington, D.C. 20036

A decision by the Benefits Review Board becomes final after 60 days from the date such decision is issued unless a petition requesting review has been filed in the appropriate United States Court of Appeals. 33 U.S.C. §921(c)

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 79-766

HOWARD CLYMER

Claimant-Petitioner

v.

E-SYSTEMS

and

LIBERTY MUTUAL INSURANCE COMPANY

Employer/Carrier-
Respondents

FILED AS PART
OF THE RECORD

SEP 30 1981

(date)

Agnes Kurtz

Clerk
Benefits Review Board

DISSENTING OPINION

MILLER, Administrative Appeals Judge, dissenting:

I dissent from the majority's denial of benefits to claimant. The record does not support my colleagues' statement that "[t]he testimony of Dr. North not only constitutes substantial evidence to rebut the presumption, but also constitutes substantial evidence to support the administrative law judge's finding that claimant's condition is not causally related to his employment." Majority Opinion, slip op. at 4. For the reasons stated herein, I would hold that employer has not rebutted the presumption of compensability mandated by Section 20(a), 33 U.S.C. §920(a).

Section 20(a) provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary -- (a) That the claim comes within the provisions of this

Act." 33 U.S.C. §920(a). This presumption finds its basis in the humanitarian nature of the Act. Leyden v. Capital Reclamation Corp., 2 BRBS 24, 27, BRB Nos. 74-226/A (1975), aff'd mem. 547 F.2d 706 (D.C. Cir. 1977). See Hensley v. Washington Metropolitan Area Transit Authority, 13 BRBS 182, F.2d , No. 79-2552 (D.C. Cir. March 17, 1981), rev'g 11 BRBS 468, BRB No. 78-637 (1979) (Miller, dissenting). Moreover,

> the beneficient purposes and humanitarian nature of the Act must be borne in mind when deciding whether the employer has presented 'substantial' evidence; thus doubtful questions, including factual ones like work-relatedness, must be resolved in favor of claimants.

Hensley, 13 BRBS at 185, F.2d at . The Section 20(a) presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 4 BRBS 466, 475, 554 F.2d 1075, 1082 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976). In order to rebut the Section 20(a) presumption, the employer must present "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." Parsons Corp. of California v. Director, OWCP, 12 BRBS 234, 235-36, 619 F.2d 38, 41 (9th Cir. 1980). Further, since this case arises under the Defense Base Act, the employer must show that the condition did not arise out of the "zone of special danger" created by claimant's conditions of employment. See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). A showing that claimant's malady may also be caused by some factors which are not work-related is insufficient to rebut the presumption.

Dr. John Dunn diagnosed claimant's illness as diabetes mellitus and transient hypertension, a diagnosis assented to by Dr. Robert North. Dr. Dunn opined that the camp diet and work conditions were both causes, albeit not the only ones, in the development of claimant's symptoms. Cl. Ex. 5. The majority, relying on the testimony of Dr. North, avers that there is no causal connection between claimant's employment and his illness.

With this assertion, my colleagues ignore the well-established principle that "a aggravation of a pre-existing condition may constitute a compensable...injury under the Act...." Wheatley v. Adler, 407 F.2d 307, 312 (D.C. Cir. 1968). Although Dr. North's testimony may be cited to for the statement that claimant's employment did not cause his malady, his testimony supports claimant's assertion that his employment aggravated these conditions.

During cross-examination by claimant's counsel, the following testimony was offered by Dr. North.

> Q Dr. North, do I understand your opinion to be then that Dr. Dunn has no medical basis for his opinion, is that correct?
>
> A Specifically there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for labile hypertension or diabetes.
>
> Q And it's your testimony that can't affect it, too, isn't that your testimony?
>
> A That if what?
>
> Q That it can't affect those disorders either?
>
> A It certainly can affect those disorders.

Hearing Transcript at 89. Dr. North later reiterated the same opinion.

> Q OK.
>
> Earlier when you was talking about diet, you took me back a little bit, but I want to make sure I understand you. You're not saying that diet can't affect bodily dysfunctions, but that you didn't see it causing bodily dysfunctions as the hypertension and as to diabetes?
>
> A That's correct.

Hearing Transcript at 102-03.

In response to a request for an explanation of why Dr. North disagreed with Dr. Dunn, Dr. North replied as follows.

> A Because that doesn't fit with our current understanding in the weight of the medical evidence as to the genesis and the nature of these diseases. There are things which may be aggravated by dietary and even environmental influences but they are obviously not caused by these things because there are many many people who are exposed to the same conditions that never develop the disorder.
>
> So there has to be some other factor or factors involved in the genesis of hypertension and diabetes. In essence that's my answer.

Hearing Transcript at 129-30. Thus, the majority's reliance on Dr. North's testimony to support its contention of no causal connection is misplaced. It is clear that the employer presented no evidence specific and comprehensive enough to sever the potential link between claimant's malady and his employment. Rather, employer's medical evidence supports claimant's contention that his illnesses were work-related.

In addition, the majority's statement that "Dr. North considered claimant's...heavy alcohol use as [a factor] aggravating his conditions" is incorrect. Majority Opinion, slip op. at 3. Although Dr. North opined that heavy alcohol use is an aggravating factor in development of hypertension and diabetes, he testified that he had no knowledge of claimant's alcohol use. Hearing Transcript at 132-33.

However, assuming arguendo that claimant did use alcohol heavily, I would still hold that the link between his illness and employment was not severed. If the conditions of employment create a zone of special danger out of which the injury arose, then a causal connection exists. O'Leary v. Brown-Pacific-Maxon, Inc. I would take judicial notice that the Sinai is a desert and conducive to drinking. Accordingly, since the employer has not established otherwise, see 33 U.S.C. §920(a), any heavy alcohol use is attributable to claimant's work environment.

Consequently, my colleagues err in their conclusion that Dr. North's testimony constitutes substantial evidence to rebut the Section 20(a) presumption. In view of the uncontradicted testimony that diet and the work environment may aggravate conditions, I would reverse the administrative law judge's denial of benefits. See Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, 118 n. 10, BRB No. 79-550 (1981).

JULIUS MILLER
Administrative Appeals Judge

Dated this 30th day
of September 1981

SERVICE SHEET

BRB No. 79-766: Howard R. Clymer v. E-Systems, and Liberty Mutual Insurance Company (Case No. 79-LHCA-1644N) (OWCP No. 2-58065)

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APPENDIX D

U.S. Department of Labor

Office of Administrative Law Judges
Hebert Federal Building
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New Orleans, Louisiana 70130

Reply to the Attention of: OALJ

In the Matter of

HOWARD R. CLYMER
Claimant

against

E SYSTEMS
Employer

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

Case No. 79-LHCA-1644N

OWCP No. 2-38065

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Before: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901, et seq.) as extended by the Defense Base Act (42 U.S.C. §1701, et seq.), hereinafter jointly referred to as the

"Act." The hearing was held on September 6, 1979 in Dallas, Texas, at which time all parties were given the opportunity to present evidence, oral arguments and post-hearing briefs, which have been admitted into evidence as Claimant's Exhibit 24 and Respondents' Exhibit 13. Application for an attorney's fee, filed by Claimant's counsel, has been admitted into evidence as Claimant's Exhibit 23. This decision is being rendered giving full consideration to the entire record.

Stipulations

The parties have stipulated, and I find, as follows:

1. The Act applies;

2. The Employer/Employee relationship existed between E Systems (the Employer) and Howard R. Clymer (the Employee) from June 16, 1976 to March 11, 1978;

3. The Notice of Controversion was filed on November 14, 1978; and

4. Claimant's annual earnings were $24,480.00.

The principal unresolved issues in controversy are:

1. Whether a compensable injury has occurred and, if so, the date thereof;

2. Whether timely notice of the injury was given to the Employer;

3. Whether Claimant has timely filed this claim;

4. The nature and extent of any disability;

5. Attorney's fee, penalties and interest; and

6. Claimant's average weekly wage.

Howard R. Clymer, fifty years of age at the time of the hearing, did not complete high school. He has spent most of his work career as a sheet metal worker. From 1957 to 1970 he operated his own sheet metal business and in 1970 he began to work for several Dallas companies as a heating and air conditioning repair man. In 1971 he again opened his own air conditioning and heating repair firm until June of 1976 when he went to work for the Employer in the Sinai. Claimant was hired to work as a heating and air conditioning mechanic although he was told from time to time he might be required to do work outside of his trade. Upon arrival at the Sinai Field Mission, Claimant spent some time unloading and setting up furniture, doing some construction and carpentry work building a 40,000

gallon water tank, all of which work he characterized "as all physical." He also helped build office structures and covered plumbing ditches, work performed from 7:30 a.m. to 5:00 p.m. in a climate described as a different type of hot weather than anything he had experienced, remarking that it was uncomfortable working in the heat. In the first five-and-one-half-months Claimant repaired only one air conditioning unit.

Claimant passed his pre-employment physical examination and testified that his health was "good" before going to the Sinai. In August of 1976 Claimant felt exhausted at the end of the day and began having headaches. On December 7, 1976 Claimant felt numbness in his right leg, in part of his right arm and the right side of his face had a numbness. He also experienced a nauseated stomach, reporting these difficulties to the paramedics at the dispensary. He was given some pills and told to rest. The following spring or summer Claimant experienced similar difficulties and he was hospitalized in Tel Aviv for one week. Upon his discharge Claimant returned to his same employment with no restrictions (Tr. 24-38).

Claimant experienced similar physical problems in late spring or early summer of 1977 while at a Tel Aviv hotel, experiencing periodic headaches also. Thereafter, in January of 1978, while shopping in a Tel Aviv department store, his headaches started to bother him and he felt quite sick. After returning to his hotel, he called his Employer who thereupon provided a doctor who gave him some pills, telling him to rest and to return to work. However, Mr. Carl Lundquist, Employer's SFM Tel Aviv Office Manager, told Claimant to pack his suitcases for admittance to a local hospital, where Claimant remained for twelve days. Thereupon, Claimant returned to work and, on February 23 or 24, 1978, was advised he would be sent home for "further medical evaluation before my condition worsened." Claimant refused to sign a release from the Employer, returned to the United States on February 26, 1978 and sought medical treatment from Dr. Dunn the next day (Tr. 150-163).

Claimant testified he was a moderate drinker, taking "maybe two or three drinks in one day" and remarking that he was intoxicated "in a period of twenty and a half months that I was there, three or four times maybe at the most." Claimant is on a "no alcohol diet, a diabetic diet." Claimant's problems with the Internal Revenue Service have been corrected. Claimant has not worked since his return to the U.S. because Dr. Dunn has advised him not to work "until this was all under control, my illnesses and so forth, whatever it is" (163-167).

Upon cross-examination, Claimant admitted that his claim was filed on August 16, 1978, that his weight in the Sinai had increased to as high as 230 or 240 and that he now weighs 182,

that his employment contract required him to perform services other than those for which he was hired, that he worked six days a week for three weeks and then had "seven days R&R" at Tel Aviv, Jerusalem, Bethlehem, Jaffa, Suez City and Cairo, Egypt. Claimant returned home for a visit in June of 1977 and then resumed his normal duties at SFM until his medical problems around January 28, 1978 in Tel Aviv, admitting that he knew something was wrong with him at that time and that he went to see Dr. Dunn on February 27, 1978, the day after his return. He stated that no one had told him that his two previous attacks were job-related (Tr. 182-202).

Claimant was concerned about the I.R.S. audit in 1977. He admitted that he sometimes drank an orange Vodka, Canadian Club or scotch in his room and at other times in the SFM lounge before playing bingo. He also admitted there was a salad bar in the dining room, that fresh fruit also was available and no one forced him to eat any particular food item. Dr. Dunn has been his family doctor since 1970. The paramedics who worked in the dispensary operated by the Employer told Claimant to return to work after his January 1978 incident (Tr. 207-229). Mr. Clymer characterized Dr. Dunn as his Department of Labor-approved doctor (Tr. 237-238). Although Claimant experienced another attack in May of 1977, shortly before returning to Garland, Texas for a vacation, he did not seek medical attention at that time (Tr. 240). Claimant's first attack occurred in December of 1976 while he was in the base camp; the second attack occurred in March or May of 1977 while at a Tel Aviv hotel and the third attack occurred at a Tel Aviv department store on January 28, 1978 (Tr. 243).

Claimant, having been called as a rebuttal witness, testified that he drank beer occasionally, but not the amount attributed to him, and that Dr. Dunn, shortly after Claimant's return to the United States, told him his diabetes might be job related (Respondents' Exhibit 6, dated April 13, 1978; Tr. 283-286).

The Employee's Claim for Compensation (Form LS-203), dated August 16, 1978, was received by the Office of Workers' Compensation Programs-Houston on August 21, 1978 (Respondents' Exhibit 10). A letter from Claimant's attorney, Samuel L. Boyd, Esq., dated November 2, 1978, was received on November 29, 1978 (Respondents' Exhibit 9).

Robert L. North, M.D., a specialist in cardiovascular diseases and internal medicine, obtained his medical degree in 1955. Dr. North, after reviewing Claimant's medical file and taking a history report, examined Claimant on April 26, 1979. At this time Claimant complained of weakness and numbness in his extremities and episodes of painful sensations also in his extremities and at times in his chest. Dr. North stated this

physical examination was normal with the exception of the presence of edema or swelling of the lower extremities. Dr. North requested a neurological evaluation in view of the complaints. Dr. Stuart Black performed a thorough neurological examination, the results of which were negative. Dr. North had Claimant's tolerance for glucose or sugar tested. These tests substantiated what previous tests had documented, namely that Claimant had mild diabetes mellitus, was placed on a diet and given oral medication. Dr. North recommended psychological testing and referral to a psychiatrist, but Claimant refused.

On the basis of this and a later examination, Dr. North concluded that he "could find no satisfactory explanation or medical diagnosis to account for Mr. Clymer's symptomatology" and that his mild diabetes and intermittent high blood pressure were under control. Dr. North expressed the opinion that these conditions (i.e. mild diabetes and intermittent high blood pressure) could not be "attributed to his occupation or to diet or to geographical location, environment, nor this sort of cause." (Tr. 58-69).

Furthermore, Dr. North did "not find any physical impairment, impairment and exercise ability coordination, anything of this sort that would preclude his employment in that field" (Tr. 70). Claimant's exercise stress test was negative, in that there was no indication of an abnormal cardiovascular response to physical exertion (Tr. 82-82). Dr. North testified that Claimant's diabetes mellitus tends to be an inherited disease and involves an insulin deficiency (Tr. 84).

Upon cross-examination, Dr. North stated that although physical stress and diet might affect diabetes, "there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for labile hypertension or diabetes." Furthermore, "obesity is a factor in the development of the manifestations of diabetes and hypertension as well" (Tr. 87-89). Dr. North admitted that an improper diet of high carbohydrates, fats and high salts may affect or aggravate his hypertension and diabetes (Tr. 100-101) but denied that physical exertion in the desert sun might affect or aggravate these conditions (Tr. 102). Anxiety or use of alcohol might aggravate hypertension (Tr. 104) but "blood pressure per se is not a disease and it doesn't cause disability. It is through its affect (sic) on other organ systems that blood pressure becomes a problem and it is to prevent these affects (sic) that we treat people with high blood pressure" (Tr. 107) because "one of the consequences of sustained high blood pressure is heart failure" as well as "hardening of the arteries," stroke and kidney disease. Furthermore, "blood pressure itself does not cause symptoms or, you know, make people dizzy or anything of that sort." Hypertension and diabetes "become clinically

apparent in middle-age years" (Tr. 110-112). Although Dr. North admitted "that diet and certain kinds of stress may aggravate these problems" he did not know what caused the symptoms of which Claimant was complaining (Tr. 121).

Dr. North opined that Claimant's physical examination and testing disclosed no objective evidence of brain disease, heart disease or kidney damage (Tr. 126). Excessive use of alcohol is "a risk factor, if you will, for both hypertension and diabetes or glucose intolerance." However, hypertension and diabetes are not caused by labor in the heat . . . because there are many people who are exposed to the same conditions that never develop the disorder." Claimant's overweight condition and one "are both aggravating factors." (Tr. 129-130).

Claimant's swelling of his legs "represents chronic venous insufficiency due to some unknown cause" (Tr. 134). "There is no sound scientific basis, though, to say that geography or occupation caused this" (Claimant's condition) (Tr. 136). Furthermore, Dr. North opined "that the location, the climate and whatever are purely accidental in this case and that had he remained in South Texas and that had he been given the same diet, the same body weight, the same, you know, problems with the I.R.S., however much he drank drinking the same, he would have developed the same problems at the same time. In that respect, it's his destiny" (Tr. 141). "True diabetes mellitus is something that does show a very strong family incident" and "there is no specific diet that causes hypertension or causes diabetes" and "that the geographic location and occupation in my opinion have nothing to do with the appearances of high blood pressure or diabetes mellitus in this case . . ." Furthermore, adequate physical activity and exercise are methods used to control hypertension and diabetes mellitus (Tr. 143-147).

Mr. Michael E. Kapple, Employer's Program Manager, testified that he was in charge of building an early warning system in the Sinai Desert, a system which was an out-growth of Henry Kissinger's shuttle diplomacy and was manned entirely by U.S. volunteers. Heavy construction started in February of 1976 and ran through mid-June of 1976, at which time the camp was 99 percent completed. Cafeteria-style meals were provided the workers, meals which were designed to approximate an American type diet as closely as possible. Each person was free to select any of the items available at any meal. The Sinai weather was comparable to Texas weather with the exception of a milder winter. The location was 2300 feet on top of a mountain and there was a continuous breeze so that even the hottest days ("110 degrees Fahrenheit") were bearable. Upon his discharge from the hospital in January of 1978, Claimant worked half days for several days and thereafter it was determined to send Claimant home to be examined by his own family doctor. Thus, Employer intended that Claimant be terminated for medical reasons because

he had missed a few work days and was physically unable to continue in his normal work capacity. However, Claimant would not agree to this procedure whereby he would receive 100 per cent of his contract benefits and, instead, returned to the United States on his own. In December of 1977 or January of 1978 Mr. Kapple learned that Claimant was being audited by the I.R.S., remarking that "he appeared to be quite anxious about it." Claimant never reported to him any job-related injury or occupational disease (Tr. 249-255).

Upon cross-examination, Mr. Kapple admitted that he knew Claimant had been in the hospital and that the I.R.S. audit "could have been later or earlier in time" possibly by six months. He testified that there was not "much manual labor for long term durations after approximately the middle of June 1976," remarking that there were various construction add-ons thereafter, that 70 percent or higher of Claimant's work was in the air conditioning-heating field, that special food items were prepared for certain workers at their request and that it was also possible for individuals to do their own cooking. Dr. Zalgaeff advised Mr. Kapple by medical report the nature of Claimant's medical problems in January of 1978. At that time, the two paramedics, Mr. Barnhill and Mr. Lay, reported that they also were concerned about Claimant's health (Claimant's Exhibit 7 and Tr. 256-267).

Mr. Walter S. Shavers, an employee of the Employer herein, testified that he first learned Claimant was claiming a job-related occupational disease or illness on April 13 or 14, 1978 in a phone conversation with Mr. H. H. McKelvey, Employer's insurance administrator. Mr. Shavers was not in Israel in January or February 1978 and had no idea what sort of notice had been given to the Employer in January or February 1978 (Tr. 270-273).

Mr. Gary Ford, Employer's personnel specialist, arrived in the Sinai in May of 1976 and departed in January of this year. On two or three occasions each month Mr. Ford tended bar in the PX lounge, testifying that on seven, eight or nine occasions he observed Claimant drinking six to eight beers at the bar in the course of an evening, that Claimant told him about an I.R.S. audit and that he seemed nervous about this sometime in the summer or fall of 1977, as well as a personal health problem (Tr. 274-278). Upon cross-examination, Mr. Ford admitted that he did not know how much money was involved in the I.R.S. audit, remarking that Claimant "was upset about it and he wanted some sort of solution" and that a lot of people drink when they are isolated (Tr. 278-282).

Dr. John Dunn reported on August 28, 1979 that Dr. Stuart Black's neurological evaluation was within normal limits, that Claimant's blood sugar level is now normal because of his diet, that he experiences intermittent episodes of hypertension and

that Claimant's camp diet of high carbohydrates, high salt intake and work conditions "were definite factors in his medical situation" (Claimant's Exhibit 5). Dr. Dunn reported on April 13, 1978 that Claimant first saw him for this condition on February 27, 1978 and that he diagnosed hypertension and possible diabetes (Claimant's Exhibit 10).On July 18, 1978 Dr. Dunn reported that Claimant's hypertension and diabetes mellitus were under control by diet and oral medication and that he "could be considered fully employable" if neurological evaluation proved negative (Respondents' Exhibit 6). Dr. Dunn reported on August 7, 1978 that Claimant's several episodes of numbness of the right side of his head probably "was transient ischemic attacks. These attacks had never occurred prior to his residing in Israel." Furthermore, Dr. Dunn opined that Employer's medical personnel mis-diagnosed acute coronary insufficiency, precordial pains and cirrhosis of the liver (Respondents' Exhibit 6).

On February 9, 1978 Dr. V. Zaigraeff reported that Claimant had been hospitalized on January 31, 1978 at Assuta Hospital, Tel Aviv, with a final diagnosis of (1) Essential hypertension, (2) Strain of the Myocardium and (3) Slight cirrhosis of the liver. It was reported that Claimant was overweight at 210 pounds (Claimant's Exhibit 6). On February 23, 1978 the camp paramedics reported that "Mr. H. R. Climer should be sent home as soon as possible due to his medical condition" (Claimant's Exhibit 7). Dr. Chaim Feldman, on February 21, 1978, reported that Claimant should "stop drinking alcohol to reduce weight" (Claimant's Exhibit 9).

The Employer's first report of accident or occupational illness (REC-202) reflects that Claimant did not return to work as of February 25, 1978, that his pay was stopped as of March 11, 1978, that the Carrier was notified on May 8, 1978 of this occupational illness and that Dr. Dunn diagnosed hypertension and possible diabetes on April 13, 1978 (Claimant's Exhibit 12).

On June 16, 1979 Dr. Robert L. North, Chief, Internal Medicine, Presbyterian Hospital of Dallas, reported that his examination of the Claimant on April 26, 1979 led to the conclusion that Claimant's mild diabetes and labile hypertension cannot be attributed to his occupation or residence in Israel (Respondents' Exhibit 1). On May 23, 1979 Dr. Stuart B. Black reported that Claimant's EEG was normal (Respondents' Exhibit 3). On March 2, 1978 Dr. Jack Spitzberg, a cardiologist and internist, opined that he could not determine an etiology for his problems in Israel, that "perhaps extreme anxiety at that time could have raised his blood pressure transiently" and that "at this point in time I feel he is generally in reasonable health for his age and aside from possibly some anxiety attacks, I can find no evidence of organic disease." (Respondents' Exhibit A). On March 16, 1978 Dr. Jack Spitzberg reported that Claimant's stress test, blood pressure, EKG and blood pressure were normal (Respondents' Exhibit 3-2). On March 17, 1978 Dr. R. J.

Garner, a radiologist, reported that Claimant's adrenal sonogram demonstrated "no adrenal masses or other abnormalities" (Respondents' Exhibit 5-19). On March 17, 1978 Dr. T. J. Davis, a radiologist, reported "PA and lateral views of the chest reveal the heart, pulmonary vascularity and both lung fields to be normal." Respondents' Exhibit 5-20).

In a history report, dated March 17, 1978, Claimant advised medical personnel at Presbyterian Hospital of Dallas that "he was a heavy drinker but says he stopped two months ago." (Respondents' Exhibit 5-7).

Findings of Fact and Conclusions of Law

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Sargent v. Matson Terminals, Inc., 8 BRBS 564, BRB No. 77-597, 77-597A (June 30, 1978); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698, BRB No. 77-103 (August 22, 1978); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 454, 467 (1968), reh. denied, 391 U.S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). At the outset it further must be recognized that all factual doubts must be resolved in favor of the Claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Company v. Shea, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921. Furthermore, it has consistently been held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 345 U.S. 128, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The Act provides a presumption that a claim comes within the provisions of the Act (33 U.S.C. §920(a)). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). To rebut this presumption, the employer must introduce substantial evidence to the contrary. Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966). Furthermore, one must introduce facts, not speculation, to overcome the presumption of compensability. Reliance on a mere hypothetical probability in rejecting a claim is contrary to the presumption. Steele v. Adler, 269 F.Supp. 276 (D.D.C. 1967). 1/

1/ Based upon the humanitarian nature of the Act, the Act is to be interpreted liberally in favor of Claimants and Claimants are to be accorded the benefit of doubts." David P. Harrison v. Potomac Electric Power Company, 8 BRBS 313, 314, BRB No. 78-139 (May 30, 1978).

It is, of course, well settled that a Claimant's credible subjective complaints, standing alone, are sufficient to establish entitlement to compensation. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454, BRB No. 78-139 (May 30, 1978), citing Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I. 1969); Rudolph McIntosh v. Parkhill Goodloe Co., 4 BRBS 3, BRB No. 75-623 (May 11, 1976), aff'd mem., 551 F.2d 1283 (5th Cir. 1977); Barbara A. Woodham v. U.S. Navy Exchange, 2 BRBS 185, BRB No. 75-105 (August 20, 1975); Larson's Workmen's Compensation Law, Volume 3, §79.53. "However, there must be some basis in the record to support the extent of the disability awarded." Woodham, supra, at 191. Furthermore, the Administrative Law Judge is permitted to rely on his own observations. Perini Corp. v. Heyde, supra.

Although Section 20 contains several presumptions, including the presumption of causality, there is no presumption that the Claimant suffered an injury. Percy L. Murphy v. SCA/Shayne Brother and American Mutual Insurance Company, 7 BRBS 309, 313, BRB No. 76-419 (February 24, 1978); Kwasizur v. Cardillo, 175 F.2d 235 (3rd Cir. 1948), cert. denied, 338 U.S. 880 (1949); Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), rehearing denied, 404 F.2d 1059 (5th Cir. 1968), cert. denied, 395 U.S. 921 (1969). Claimant must prove all that is not presumed. "Thus, the burden is on the Claimant to prove his injury. We do not believe the presumption of causality found in Section 20 is applicable in a case such as this because there must be proof of an injury before the presumption can arise." Murphy, supra, at 314. 2/

Moreover, in considering the issue of causal relationship, Claimant has the benefit of the legislative policy favoring awards in arguable cases. This Administrative Law Judge is bound by longstanding rules of judicial construction that the statute should be construed liberally in favor of claimants and that doubts should be resolved in their favor. Swanton, supra, at 1084; Wheatley v. Adler, 407 F.2d 307, 313-314 (D.C. Cir. 1968); James H. Brennan vs. Bethlehem Steel Corporation, 8 BRBS 419, BRB No. 77-203 (February 14, 1978). "Swanton holds that the Act presumes a claim to fall within its provisions, in the absence of substantial evidence to the contrary; that is,

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2/ This presumption of compensability does not apply to a claim that disability is permanent rather than temporary since the issues of nature and extent of disability are quite properly litigated without the benefit of the presumption. David P. Harrison v. Potomac Electric Power Company, 8 BRBS 313, BRB 78-139 (May 30, 1978); Elroy A. Lewis v. Sun Shipbuilding and Dry Dock Company, 8 BRBS 613, BRB 77-388 (July 24, 1978); Huntsman v. Sun Shipbuilding and Dry Dock Company, 8 BRBS 141, BRB No. 77-246 (March 31, 1978).

the employer must rebut the presumption prima facie with substantial countervailing evidence. Id. at 1081. For that rule, the D.C. Court of Appeals cited Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935). Del Vecchio stands as the United States Supreme Court's last extensive analysis of the Section 20 presumptions. Hence, it is binding on all administrative and judicial tribunals that oversee the Act. The Del Vecchio case applies the 'bursting bubble' theory of presumptions to Section 20 of the Act. According to that theory, 'the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears.' McCormick's Handbook of the Law of Evidence, §345 at 821 (2d ed. 1972). 'Once the employer has carried his burden by offering testimony sufficient to justify a finding . . . [opposed to the presumed fact], the presumption falls out of the case . . . . [Its'] only office is to control the result where there is an entire lack of competent evidence. Del Vecchio at 286.'

"What the Swinton court found was that the Deputy Commissioner had failed to accord the presumption sufficient respect. The court said, 'We are satisfied that if the presumption had been honored, the Deputy Commissioner would have had to find that it was not overcome by substantial evidence.' Swinton at 1081-1082. That is, under the Del Vecchio test, the employer has failed to rebut the presumption." Brennan, supra, at 423-424.

What constitutes substantial evidence depends upon the facts and circumstances of each compensation claim, especially the Claimant's credibility. In Charles F. Ethier v. General Dynamics Corporation, 8 BRBS 575, BRB No. 78-287 (July 20, 1978), the Benefits Review Board, in affirming denial of a claim under the Act, ruled that an Administrative Law Judge properly considered the testimony of a physician in concluding that the Employer had dispelled the Act's Section 20(a) presumption that the claim comes within provisions of the Act and in concluding that the disability was unrelated to the accident. The Claimant had contended that the physician did not examine the Claimant in person, did not attempt to ascertain the accuracy of Claimant's accident history taken at Employer's infirmary and that, therefore, his testimony should have been disregarded. The physician based his opinion on all available evidence of Claimant's condition and knew all the pertinent facts. Other than a short time for necessary medical attention, Claimant lost no time from work due to the injury until February 24, 1976, at which time Claimant suffered a grand mal seizure.

Once the Section 20(a) presumption is overcome by the introduction of substantial evidence, the fact-finder proceeds to evaluate the evidence introduced by the parties. Travelers Insurance Co. v. Bolair, 417 F.2d 297, 301 n.6 (1st Cir. 1969); Yorat v. Universal Terminal and Stevedoring Corp., 3 BRBS 151, BRB No. 75-162 (Jan. 12, 1976). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion. "Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Steele v. Adler, 269 F. Supp. 374 (D.D.C. 1967); De Nichilo v. Universal Terminal and Stevedoring Co., 5 BRBS 723, BRB No. 76-327 (April 1, 1977). The statement in the Act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by the evidence. Crowell v. Benson, 285 U.S. 22, 46 (1932); Avignone Freres, Inc. v. Cardillo, 117 F.2d 385, 386 (D.C. Cir. 1940); Goins v. Noble Drilling Corp., 397 F.2d 392 (5th Cir. 1968). 3/ In evaluating this evidence, as indicated above, I have operated under the statutory policy that all doubtful fact-questions are to be resolved in favor of the injured employee because the intent of this statute is to place the burden of possible error on those best able to bear it. Young & Co. v. Shea, supra. This statutory policy places a less stringent burden of proof on the claimant than the "preponderance of the evidence" standard which is applicable in a civil suit. Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir. 1969). 4/

After having reviewed all of the medical evidence and other record evidence in this case and having observed the demeanor of the witnesses, I find that Respondents have introduced substantial evidence to rebut the Section 20(a) presumption, that the presumption does not control the result herein and I will now proceed to weigh all of the evidence, resolving all doubts in favor of the Claimant herein.

Section 12 of the Act requires the Employee to give written notice of an injury within 30 days to both the Deputy Commissioner and the Employer. Section 12(a) provides as follows:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given

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3/ This presumption that employment caused the disability for which the claim is brought may be rebutted without showing any other cause of the injury. Thus, the Benefits Review Board affirmed a decision that the presumption is rebutted based on evidence which is substantial but which does not show the cause of injury. Lovel V. Carver v. Potomac Electric Company, 8 BRBS 43, BRB No. 77-460 (March 28, 1978).

4/ Other cases wherein the Benefits Review Board has affirmed decisions dismissing compensation claims because the Employer had successfully rebutted the Section 20 presumption: Major F. Warren v. International Great Lakes Shipping Company and American Mutual Liability Insurance Company, 6 BRBS 79, BRB No. 76-428 (May 23, 1977); Joseph C. Kirby Sr. v. Marriott Corporation and Liberty Mutual Insurance Company, 6 BRBS 200, BRB No. 76-215 (May 23, 1977).

> within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence, should have been aware, of a relationship between the injury or death and the employment.

Section 13(a) provides in part:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

In applying both Section 12 and Section 13, it is well-recognized that the Act is to be liberally construed in conformance with its beneficent and humanitarian purposes in a way which avoids harsh and incongruous results. Voris v. Eikel, 346 U.S. 328, 333 (1953); Kenneth M. Simonson v. Allbins Engine and Machine Works, 7 BRBS 100, 102, BRB No. 76-353 (December 13, 1977).

Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to prevent prejudice to them from the entertainment of stale claims. Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinshead, 571 F.2d 272, 275 (5th Cir. 1978). This statute of limitations was designed to insure fairness to the employer. Its purpose is to prevent the revival of stale claims where "evidence has been lost, memories have faded and witnesses have disappeared." Bolton v. Traynor, 381 F.2d 82 (4th Cir. 1967).

The statute of limitations contained in Section 13 of the Act is mandatory and compliance therewith has been termed "jurisdictional." Sun Shipbuilding and Dry Dock Company v. Bowman, 507 F.2d 146 (3rd Cir. 1975). Once the statute of limitations has run, the burden of proof falls upon the claimant to show an excuse for his delay in filing his claim and that the employer has not been prejudiced by the delay. La Londe v. Gulf Oil Corp., 317 F.Supp. 692 (W. D. La. 1970). Otherwise, his claim must be time-barred. Ignorance of the law does not constitute a viable excuse for filing a claim after the limitations period has expired. La Londe, supra.

As previously noted, Section 13(a) provides that the time limitation begins to run when a claimant is aware or should have been aware of a relationship between his injury and his employment. Injury is defined in Section 2(2) of the Act to include

occupational disease. See 33 U.S.C. §902(2). Thus, the crucial question for purposes of Section 13(a) is when did Claimant become aware of a relationship between his hypertension and his employment. In Stark v. Lockheed Shipbuilding and Construction Co., 5 BRBS 186, BRB No. 75-253 (December 8, 1976), the Board extensively analyzed the meaning of the term "aware" as it is used in Section 13(a) of the Act. The Board concluded that in cases of occupational disease and latent injury, "aware" means "to have received knowledge of the work-related nature of the claimant's condition from a physician or other competent diagnostician." Stark, supra, at 195. The Board further concluded that the phrase "or in the exercise of reasonable diligence should have been aware" places a duty on the claimant to seek diagnostic confirmation of the nature and cause of his condition but that this duty does not arise until claimant has reason to believe that the condition "will or may well reduce his wage earning capacity." Furthermore, once a claimant has obtained a professional diagnosis, he will be considered "aware" for purposes of Section 13(a) and the time limitation of that provision will begin to run. See Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); Washington v. Cooper Stevedoring of La., Inc., 556 F.2d 268 (5th Cir. 1977); Aerojet-General Shipyards, Inc. v. O'Keefe, 413 F.2d 793 (5th Cir. 1969). 5/

However, the Act also sets forth an exception to Section 13(a). Section 30(a) of the Act, 33 U.S.C. §930(a), provides that the employer must file a report containing certain specified information within ten days from the date of the injury or ten days from the date employer has knowledge of the injury. Section 30(f) of the Act, 33 U.S.C. §930(f), provides that if the employer had knowledge of the injury, failure to file the report required by Section 30(a) will toll the Section 13(a) limitation period regardless of whether the claim would otherwise be barred. 6/

5/ The date on which a claimant is informed by his doctor of the relationship between his work and his disability is significant but it is not always controlling, especially where there is other evidence that claimant was aware, or in the exercise of reasonable diligence should have been made aware, of this relationship at an earlier date. Harold Sicker, Sr. v. Muni Marine Company and State Insurance Fund, 8 BRBS 264, 272, BRB No. 77-470 (April 27, 1978); Morris W. Vaughan v. Washington Metropolitan Area Transit Authority, 7 BRBS 264, BRB No. 76-115 (December 30, 1977).

6/ An employer must know of the relationship of the employment to an injury or illness in order for the knowledge requirements of Sections 12(d) and 30(f) of the Act to be applied against the employer. Strachan Shipping Company, et al v. Willie Davis and Director, OWCP, 571 F.2d 968, 8 BRBS 761 (5th Cir. 1978).

This case does not involve an incorrect diagnosis of a physician which would, in effect, toll the statute of limitations. If the diagnosis were incorrect and the Claimant relied upon it, then the one year statute of limitations does not begin to run until the claimant "realized, or should have first realized, that his ailment was job related." Sun Shipbuilding and Dry Dock Company v. Bowman, 507 F.2d 46 (3rd Cir. 1975); Pillsbury v. United Engineering Co., 342 U.S. 197 (1952); Stancil v. Massey, supra; Washington v. Cooper Stevedoring, supra; Bernice Jackson v. Navy Exchange Service Center and Community Union Insurance Company, 9 BRBS 437, BRB no. 77-374 (December 22, 1978).

In view of the foregoing, I conclude and find that Claimant became "aware, or by the exercise of reasonable diligence should have been aware," based upon a professional opinion of a medical doctor on December 7, 1976 (Claimant's Exhibit 4), that he had intermittent labile hypertension and, consequently, the Section 12(a) and 13(a) time limitations started to run at that time (i.e. December 7, 1976). I further find that Claimant's claim for workmen's compensation benefits on August 21, 1978 was not timely filed. 7/

However, assuming, arguendo, that the claim herein was timely filed, I will now consider whether Claimant's hypertension and diabetes mellitus are compensable disabilities under the Act.

Based upon the totality of the record, I conclude and find that Claimant's diabetes mellitus was first reported in writing by Dr. Dunn on April 13, 1978. On December 7, 1976, at which time Claimant's hypertension was first diagnosed, it was also reported that Claimant's routine laboratory examinations, ECG and EEG were normal. I also accept the diagnosis by Dr. V. Zaigraeff, on February 9, 1978, the Claimant had essential hypertension, myocardial strain, slight cirrhosis of the liver from alcohol intake and was overweight at 210 pounds (Claimant's Exhibit 7). At this time Claimant was placed on a strict diet -- "no fats, no salts, no spices, no alcohol." I accept the diagnosis of Dr. Dunn that Claimant had diabetes based upon a physical examination on February 27, 1978 (Claimant's Exhibit 10). On March 17, 1978 Claimant advised medical personnel at Presbyterian Hospital of Dallas that he had intentionally lost twenty-two pounds while working in Israel. (Respondents' Exhi-

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7/ I am aware that an employee need not notify his employer of a compensable injury in accordance with Section 12(a) of the Act "until he knows or reasonably should know that he has received an injury, arising in the course of employment, that disables him from future employment." Bath Iron Works Corporation and Commercial Union Assurance Company v. James P. Galen and Director, OWCP, 603 F.2d 583, 10 BRBS 861 (1st Cir. 1979).

bits 5-7). Therefore, I find that Claimant, while working in Israel, weighed as much as 232 pounds, weight which was entirely too heavy for his bodily frame (See Claimant's Exhibit 2, a photograph of the Claimant and others in front of the Sinai Field Mission).

I accept the opinions of Dr. Robert L. North, an eminent specialist in cardiovascular and internal medicine, who was subjected to excellent, thorough and searching cross-examination and who testified forthrightly that Claimant's intermittent hypertension and mild diabetes mellitus were not employment-related and could not be attributed to his occupation, his diet, geographical location or work environment, that he (Dr. North) did not find any physical impairment which would preclude his return to his previous employment, that diabetes mellitus is an inherited disease, that Claimant's hypertension and mild diabetes were under control by diet and medication, that high blood pressure per se is not a disease and does not cause disability, that hypertension and diabetes become clinically apparent in middle-age years and that Claimant even if he had remained in South Texas would have developed the same problems at the same time because "(i)n that respect, it's his destiny." I also accept Dr. North's opinion that adequate physical activity and exercise are methods used to control hypertension and diabetes mellitus. Therefore, Claimant's manual labor might actually have had a therapeutic effect, instead of the alleged debilitating or aggravating effect claimed herein.

I also accept the diagnosis that Claimant had extreme anxiety and that this condition, together with his family problems, and isolated living, the I.R.S. audit and personal living habits, especially the excessive use of alcohol and his obesity contributed to his hypertensive condition and diabetes mellitus.

Furthermore, it is noted that Claimant's last two attacks occurred while he was away from the Sinai Field Mission and in Tel Aviv, enjoying his week's vacation at the "R & R" facility provided by the Employer. While it may be merely coincidental, I find this to be most significant, especially in view of his admission against interest, in a medical history record on March 17, 1978, that "he was a heavy drinker" but stopped two months ago (Respondents' Exhibit 5-7).

I also credit Mr. Kapple's testimony as to construction and functioning of the Sinai Field Mission, the nature of Claimant's duties there, the meals provided, the climate in the Sinai and the work environment. Furthermore, I also credit Mr. Ford's testimony as to Claimant's drinking habits while Mr. Ford was tending bar at the lounge.

I also accept Dr. Black's opinions that Claimant's neurological examination was normal. I credit the opinions of Dr. Spitzberg that he could find no evidence of uremic disease, that he could not determine an etiology for his problems in Israel and that Claimant is in reasonable health for his age.

I am well aware of the well-settled doctrine that an employer takes a workman "as is" and if the workman has a pre-existing condition which is accelerated, aggravated or which manifests itself as the result of exertion incidental to the work required, a compensable injury results even though such exertion may not have harmed a person not suffering from the particular infirmity. J. B. Vozzolo, Inc. v. Britton, supra, at 148. "Also, the aggravation of the pre-existing back condition by the 'insult' to the Claimant's back which arose out of and in the course of his employment constituted injury under the Act." John H. Pasinski v. I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company, 7 BRBS 102, BRB No. 77-277 (February 28, 1978). I am not persuaded that the record before me contains any such evidence showing causality between Claimant's present problems and his employment. I, therefore, find that Claimant suffered no compensable injury while employed by E Systems. As the Benefits Review Board pointed out in Lennert V. Carlson v. Bethlehem Steel Corporation, 8 BRBS 486, 488, BRB No. 78-247 (June 20, 1978): "Claimant's employment with Bethlehem Steel Corporation only furnished a convenient occasion to demonstrate to Claimant that his severly (sic) advanced degenerative osteoarthritis involving both knees will no longer tolerate any further weight-supporting activity, particularly climbing vertical ladders, compensation must be and is hereby denied."

The concept of an occupational disease is aptly expressed by the following quotation:

> "It is not the intent of this statute to create a general health insurance program. The inclusion of occupational diseases is limited to maladies resulting from working conditions which are peculiar to the calling and are more hazardous than those encountered in ordinary living." Collins v. Lackland Army & Air Force Exchange Service, 5 ARBS 41 (ALJ) October 30, 1975.

On the basis of the totality of the medical evidence and other record evidence and having observed the demeanor of the witnesses, I find and conclude that Claimant's hypertension and diabetes mellitus were not caused, triggered, aggravated or exacerbated by his employment or the work environment. I further find and conclude that Claimant's hypertension and diabetes mellitus would have occurred irrespective of his employment in the Sinai and would have occurred had he remained in the United States working at an occupation not subject to the jurisdiction of the Act. The diabetes mellitus is the natural progression of the Claimant's pre-disposition. To use Dr. North's words, "it's his destiny." There is no credible evidence that Claimant's hypertension is work-related. It is probably the result of his lengthy isolation from his family, the I.R.S. audit and his personal living habits.

Although Claimant properly argues that the Act should be interpreted liberally, it is well-settled that "claim terms of the statute may not be disregarded under the guise of interpreting it liberally." Ewell v. Voris, supra, at 333; Pillsbury v. United Engineering Co., 342 U.S. 197, 200 (1952).

Based upon the totality of the record and the foregoing Findings of Fact and Conclusions of Law, it is determined that the claim must be denied. As I have ruled that Claimant has not sustained a compensable disability under the Act, his attorney is not entitled to an attorney's fee assessed against the Respondents.

ORDER

The claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Base Act, filed by Howard R. Clymer is hereby DENIED.

DAVID W. DI MARDI
Administrative Law Judge

Dated: November 30, 1979
New Orleans, Louisiana

DWD:hls
A1-18

CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 1979 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Eighth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Howard Clymer, 4202 Colgate, Garland, Texas 75042
Claimant

E Systems Incorporated, P. O. Box 1016, Greenville, Texas 75401

Liberty Mutual Insurance Company, 2530 Walnut Hill, Dallas, Texas 75229
Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following:

Judge David Di Nardi, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U. S. Department of Labor, Washington, D.C. 20211
Samuel Boyd, Esquire, 5744 LBJ Freeway, Dallas, Texas 75240
John William Payne, Esquire, 1700 Republic National Bank Bldg, Dallas, Texas

Deputy Commissioner
Eighth Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 19

APPENDIX E

OMB Approval No. 44-R1272

EMPLOYEE'S CLAIM FOR COMPENSATION

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

1. OWCP No.

2. Carrier's No.

SEE INSTRUCTIONS ON REVERSE

3. Name of person making claim (Type or print): First: Howard; Middle initial: R.; Last: Clymer

4. Date of injury (Month/day/year): Manifestation of disease first reported 1/78

5. Claimant's address (Number, street, city, state, ZIP code): 4202 Colgate, Garland, Texas 75042

6. Marital status: Married

7. Sex: [X] Male [ ] Female

8. Age or date of birth (Month/day/year): Aug. 1, 1929

9. SOCIAL SECURITY NUMBER (Not required by law): 458 | 34 | 1109

10. Did injury cause loss of time beyond day or shift of accident? [X] Yes [ ] No

11. On date of injury, time began work: [ ] A.M. [ ] P.M.

a. Hour began work: [ ] A.M. [ ] P.M.

b. Hour of accident: [ ] A.M. [ ] P.M.

c. Did you stop work after this time? [ ] Yes [ ] No

12. Date and hour you stopped: 3-11-78 [ ] A.M. [ ] P.M.

13. Date and hour you returned to work: Still off; indefinite duration

14. Occupation (Job title) (employee worker, apprentice, etc.): Air Con/Heating Mechanic

15. Injured while doing regular work? [ ] Yes [X] No (If "No," explain in Item 24)

16. Wages or earnings when injured (Including overtime allowances, etc.): a. Weekly: $

b. Total earnings during year (Annualized before injury): $24,480.00

17. Has 3rd party or other claim been made because of this injury? [X] Yes [ ] No subject to this claim

18. Number of years you worked for this employer: 1 yr. 11 mos.

19. Number of days usually worked per week: 6

20. Name of supervisor at time of accident: G. D. Wheatley

21. Earliest date supervisor or employer knew of accident: Employer knew of occup. disease manifestation 1/78

22. Were you employed elsewhere during the week injured? [X] No [ ] Yes (If "Yes," state where and when on reverse.)

23. Exact place where accident occurred (Street address, city, town, Name of vessel, plan, terminal, etc.): Sinai Buffer Zone Israel

24. Describe in full how the accident occurred (Relate the events which resulted in the injury or occupational illness. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse.) On Jan. 30, 1978 Mr. Clymer visited Dr. Chaim Feldman in Tel Aviv Israel at which time his condition was diagnosed as hypertension & coronary insufficiency. April 13, 1978 John Dunn, M.D., Richardson, Tex. diagnosed his condition

25. Nature of injury (Name part of body affected, fractured (whether leg, bruised right thumb, etc. If there was a loss or loss of use of a part of the body, describe.): as hypertension - possible diabetes; disabilitive attributed to the work environment & diet provided by the employer. (See reverse side) Unknown, see line 24.

26. Have you received medical attention for this injury? [X] No [ ] Yes (If "Yes," give name and address of doctor, clinic, hospital, etc.): Only partial attention. Insurance carrier ceased assistance without cause in March, 1978.

27. Were you treated by a physician of your choice? [X] Yes [ ] No once returned to U.S. by employer.

28. Has such treatment been provided by employer? [X] Yes [ ] No thru 3/78

29. Are you still disabled on account of this injury? [X] Yes [ ] No

30. Were you worked during the period of disability? [ ] Yes [X] No

31. Have you received any wages since becoming disabled? [ ] Yes [X] No (If "Yes," give dates on reverse.)

32. Has injury resulted in permanent disability, amputation or serious disfigurement? [X] Yes (Describe on reverse.) [ ] No

33. Name of employer (Individual or firm name): E-Systems, Greenville Division

34. Nature of employer's business: Early Warning System Sinai

35. Address of employer (Number, street, city, state, ZIP code): P. O. Box 1056, Greenville, Texas 75401

36. If accident occurred outside the U.S., state whether you are a U.S. citizen [X] Yes [ ] No

37. I hereby make claim for compensation benefits, necessary and medical, under the Defense Base Act

Signature of claimant or person acting on his or her behalf: Howard R. Byrd Attorney for Claimant

38. Date of this claim (Month/day/year): 8/[illegible]/78

Section 31 of the Longshoremen's Act, 33 U.S.C. 931, provides as follows: Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

ATTORNEY FOR EMPLOYEE

Form LS-203
(Rev. May 19[illegible])

83 388

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

E-SYSTEMS, INC.,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

HOWARD R. CLYMER,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID W. TOWNEND
DEHAY & BLANCHARD
2300 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 651-7000

Attorney for Petitioners

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LISTING UNDER SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporate Petitioner.

1. E-Systems, Inc. has no parent, subsidiary or affiliate companies.

2. Liberty Mutual Insurance Company has no parent companies or subsidiaries that are not wholly owned. Liberty Mutual Insurance Company has one affiliate company named Liberty Mutual Fire Insurance Company.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4310

HOWARD R. CLYMER,
Petitioner,

versus

E-SYSTEMS, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of an Order of the Benefits Review Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 2, 1982, 5 Cir., 1982,___ F. 2d___).

(JUNE 14, 1983)

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4310

HOWARD R. CLYMER,
Petitioner,

versus

E-SYSTEMS, Employer, and
LIBERTY MUTUAL INSURANCE
COMPANY, Insurance Carrier,
and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of an Order of the Benefits Review Board

(DECEMBER 2, 1982)

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Howard R. Clymer seeks review of a decision by the Benefits Review Board (BRB) of the United States Department of Labor under the Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §901, as extended by the Defense Base Act, 42 USC. §1651. The BRB, one member dissenting, upheld an

Administrative Law Judge's (ALJ) denial of benefits, opining that the evidence failed to establish a causal connection between Clymer's employment and his physical condition. Finding an erroneous application of the LHWCA, we reverse the denial of benefits and, because of insufficient factual findings on the extent of disability, remand for further proceedings.

Context Facts

In June 1976, Clymer, then 47 years old, was employed by E-Systems, Inc. as a heating and air-conditioning mechanic for work in the Sinai Field Mission, an early warning system located in the Gideon-Mitla passes in the Sinai Peninsula.[1] Clymer then suffered no symptomatic medical problems, and an employment physical apparently disclosed none.

Upon his arrival in Israel, Clymer began working substantially, if not principally, on tasks other than those typically associated with heating and air-conditioning work. His initial assignments involved manual labor and construction work. Clymer's work attitude and efforts met with the approval of his superiors who commended him. He apparently worked hard.

In August 1976 Clymer began to experience difficulties. The first manifestation was a chronic sense of exhaustion. By the following December he suffered nausea and the onset of numbness of the right leg, right arm and right side of his face. He reported to the paramedics who gave him pills. He was subsequently hospitalized and his condition was diagnosed as transient hypertension with possible cerebral ischemia. He returned to work but continued to be troubled by intermittent headaches and bouts of nausea. In May 1977 Clymer returned home for a visit but sought no medical treatment. In June 1977 he went back to the Sinai after signing on for a second year of duty.

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[1] *See Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982).

In January 1978, Clymer was hospitalized for 12 days. The following month he returned home to seek medical treatment. His employment by E-Systems was terminated in March 1978.

In August 1978 Clymer filed for benefits under the LHWCA. In denying benefits the ALJ concluded that Clymer had failed to provide his employer with timely notice of the claim as required by 33 U.S.C. § 912(a), failed to file his claim within one year as required by 33 U.S.C. § 913(a), and failed to establish a causal link between his employment and the disability asserted.

The evidence before the ALJ included reports from Dr. John Dunn, Clymer's family physician, together with reports or testimony from other doctors to whom Clymer was directed for examination. Dr. Dunn stated that Clymer was disabled due to hypertension and diabetes mellitus. He concluded that work conditions, environment and diet were contributing causes of these difficulties.

Dunn's medical opinion was challenged in part by Dr. Robert L. North, a physician with impressive professional credentials. Dr. North agreed with the diagnosis of hypertension and diabetes, but testified that neither disorder was caused by Clymer's work in the Sinai, climatic conditions there, or diet. Dr. North was of the opinion that Clymer would likely have suffered the same debilitating difficulties even if he had not left Dallas. He believed the condition to be controllable through diet and medication and found Clymer's thus controlled.

The ALJ credited Dr. North's testimony in finding that E-Systems had successfully rebutted the Section 20(a) presumption of causality[2] and in finding that Clymer's condition was not

[2] The statutory presumption of compensability, which appears at section 20(a) of the Act, 33 U.S.C. § 920(a), provides as follows:

aggravated by employment related factors. The BRB affirmed, addressing only the aggravation issue. It concluded that Dr. North's testimony constituted substantial evidence to rebut the statutory presumption. The dissenting member was of the opinion that the employer had not rebutted the statutory presumption of compensability and that Clymer's diet and work environment aggravated a pre-existing condition.

Causality and Aggravation

The scope of our review is limited — we simply determine whether there is substantial evidence on the record as a whole to support the ALJ's conclusion that the employment environment did not aggravate Clymer's condition. That measure of evidence is defined as "'a substantial basis of fact from which the fact in issue can be reasonably inferred ....'" *Diamond Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978) *(quoting NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 299-300 (1939)). *See Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 633 (1982); *Todd Shipyards, Inc. v. Fraley*, 592 F.2d 805 (5th Cir. 1979); *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

We are persuaded that the conclusion of the ALJ, upheld by the BRB, on the issue of aggravation is not supported by the quantum of evidence required. Although we have examined the entire record,

---

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary —

(a) that the claim comes within the provisions of this Act.

This presumption "applies as much to the nexus between an employees' malady and his employment activities, as it does to any other aspect of a claim." *Swinton v. Kelly*, 554 F.2d 1075, 1082 (D.C. Cir.), *cert. denied.*, 429 U.S. 820 (1976).

we need not look beyond the testimony of Dr. North, upon which the ALJ principally relied, in overturning the BRB's decision. Dr. North testified that Clymer's medical problems, hypertension and diabetes, were "things which may be aggravated by dietary and even environmental influences," although they would not be caused by such. There is no contrary evidence in the record. The medical opinion as to aggravation of a pre-existing condition is thus uncontradicted.

If an employee is able to show that employment conditions aggravated a pre-existing condition resulting in disability, the LHWCA provides benefits commensurate with the disability. *Fulks v. Avandole Shipyards, Inc.; Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). We conclude that Clymer is entitled to benefits for a disabling work-related aggravation of a pre-existing condition.

Disability — Extent of Benefits

The ALJ found that Clymer suffered no disability.[3] In reaching this conclusion the ALJ credited the testimony of Dr. North, who examined Clymer in April 1979, 14 months after he had returned from the Sinai and undergone a course of treatment by Dr. Dunn. Dr. North could find no physical impairment which would preclude Clymer's return to his prior employment. The ALJ credited Dr. North's testimony that hypertensive and diabetic conditions were being controlled by diet and medication, and the medical opinion of two other doctors who stated that Clymer's neurological examination was within normal limits and that there was no evidence of organic disease.

[3] Disability "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10).

We find no medical evidence offered by E-Systems addressing the question of whether Clymer's condition prevented him from earning comparable wages prior to the time his condition improved due to diet and medication. The only evidence on this point is found in the reports of Dr. Dunn. On April 13, 1978, Dr. Dunn reported that Clymer was unable to work, a condition which would continue indefinitely. In a subsequent report, Dr. Dunn stated that if a neurological examination proved negative, Clymer would be considered employable. That examination, as noted above, was negative; however, Dr. Dunn advised Clymer against returning to work. In a letter dated August 28, 1979, Dr. Dunn stated that Clymer's condition remained the same, with the exception that his blood sugar level was normal. "The same" was nor further defined and no explanation was offered for his advice to Clymer that he defer returning to work.

The ALJ's findings do not provide a sufficient basis for an evaluation of the extent of Clymer's disability claim. There are no findings relative to Clymer's symptoms, including fainting, periods of semi-consciousness and numbness, and how these would bear upon a finding of total temporary, permanent partial, or temporary partial disability. The evidence of record points to the existence of a period of disability, however, we are unable to fathom how much or how long. We must remand for further findings on the issue of disability.

Statute of Limitations

Under Section 913(a) of the Act, a claim under the LHWCA is time-barred unless it is filed within one year after an employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. The ALJ found that Clymer was aware that he had intermittent labile hypertension on December 7, 1976 and therefore his claim,

filed August 21, 1978, was not timely. The ALJ made no finding, however, that Clymer was told in December 1976 that his condition was employment related.

The ALJ's finding is not supported by substantial evidence. Although aware from late 1976 that he had some sort of affliction, it appears that the first time Clymer had reason to suspect his condition was employment related was in April 1978, after he received Dr. Dunn's diagnosis. *See Fulks v. Avondale Shipyards, Inc.*, 637 F.2d [illegible] 1012 ("the period 'begins to run when the employee know[illegible] reasonably should know, that his condition . . . arose out of his employment' "). Clymer's claim was therefore timely filed.

Under section 912(a), Clymer was required to give notice to E-Systems within 30 days. This requirement was also satisfied — an E-Systems employee testified that the company received notice of Clymer's claim in April 1978. We therefore conclude that the ALJ's finding that Clymer failed to comply with the LHWCA's time and notice requirements, which finding the BRB did not address, is not supported by substantial evidence.

REVERSED and REMANDED for further proceedings consistent herewith.

APPENDIX C

C-1

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 79-766

HOWARD CLYMER	)
Claimant-Petitioner,	)
v.	)
E-SYSTEMS	)
and	)
LIBERTY MUTUAL INSURANCE COMPANY	)
Employer/Carrier-	)
Respondents	) DECISION and ORDER

Appeal from the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Samuel L. Boyd (Kelsoe & Ayres), Dallas, Texas for the claimant.

John W. Payne and David Townend (DeHay & Blanchard), Dallas, Texas, for the employer.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by claimant from the Decision and Order (79-LHCA-1644N) of Administrative Law Judge David W. DiNardi pursuant to the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 *et seq.*,

*Dissent by MILLER, Administrative Appeals Judge, to follow.

as extended to the Defense Base Act, 42 U.S.C. §1651 *et seq.* (hereinafter, the Act). This case involves the issue of whether claimant's hypertension and diabetes were either caused or aggravated by working conditions and his diet while working in Israel for employer.

In June 1976, claimant, a mechanic, was hired by E-Systems (hereinafter, employer) and sent to employer's Sinai Mission Field in Israel. On December 7, 1976, after experiencing numbness and nausea, claimant was hospitalized. A diagnosis of transient hypertension with possible cerebral ischemia was made; however, causation was not established. Cl. Ex. 4, Res. Ex. 7. Following his hospitalization, claimant returned to work and continued to experience intermittent attacks of headaches and nausea. Claimant again was hospitalized in January 1978, and he subsequently returned to the United States for further medical evaluation. Upon his return, in February 1978, claimant was examined by his family physician, Dr. John Dunn. In a report dated April 13, 1978, Dr. Dunn concluded that claimant was unable to return to work due to hypertension and possible diabetes mellitus. Cl. Ex. 10. In a report dated August 28, 1978, Dr. Dunn attributed claimant's condition in part to the work conditions and diet in Israel.

Claimant filed under the Act in August 1978, and employer controverted. Subsequent to a hearing, the administrative law judge denied benefits. He found that claimant failed to provide employer with timely notice of injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a). He further found the claim barred by Section 13, 33 U.S.C. §913. Assuming *arguendo* that the claim was timely, the administrative law judge found no causal connection between claimant's condition and his employment. Section 2(2), 33 U.S.C. §902(2). Claimant appeals the decision of the administrative law judge, urging reversal of these findings.

On the issue of causal connection, the record contains conflicting medical opinion. Dr. John Dunn, claimant's treating physician, opined, in a report dated August 28, 1978, that claimant's work conditions and diet were both contributing causes to his hypertension and diabetes. Dr. John North, however, testified that neither of these conditions may be attributed to claimant's occupation, geographic location, work environment or diet. In Dr. North's opinion, claimant would have developed the same impairments had he remained in Texas. He denied that the manual labor required of claimant in his job aggravated these conditions. Moreover, Dr. North considered claimant's age, overweight, and heavy alcohol use as factors aggravating his conditions.

In a detailed and well reasoned opinion, the administrative law judge found that employer had rebutted the Section 20(a) presumption of causal connection. The administrative law judge credited the testimony of Dr. North and found that claimant's hypertension and diabetes mellitus would have occurred irrespective of his employment. Moreover, the administrative law judge found that these conditions were not aggravated by claimant's employment, work environment or diet. He credited testimony that employer provided cafeteria-style meals, designed to approximate the American-type diet, that special food items could be prepared for workers at their request, and that it was possible for individuals to do their own cooking.

The factfinder is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The testimony of Dr. North not only constitutes substantial evidence to rebut the presumption, but also constitutes substantial evidence to support the administrative law judge's finding that claimant's condition is not causally related to his employment. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Accordingly, we affirm the administrative law judge's denial of benefits on the basis of the lack of causal connection. We do not reach the other issues appealed.

SO ORDERED.

SAMUEL J. SMITH
Chief Administrative Appeals Judge

I Concur:

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 11th day
of June 1981

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

A decision by the Benefits Review Board becomes final after 60 days from the date such decision is issued unless a petition requesting review has been filed in the appropriate United States Court of Appeals. 33 U.S.C. §921(c)

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 79-766

HOWARD CLYMER	)	
Claimant-Petitioner	)	
v.	)	
E-SYSTEMS	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Employer/Carrier-	)	
Respondents	)	DISSENTING OPINION

MILLER, Administrative Appeals Judge, dissenting:

I dissent from the majority's denial of benefits to claimant. The record does not support my colleagues' statement that "[t]he testimony of Dr. North not only constitutes substantial evidence to rebut the presumption, but also constitutes substantial evidence to support the administrative law judge's finding that claimant's condition is not causally related to his employment." Majority Opinion, slip op. at 4. For the reasons stated herein, I would hold that employer has not rebutted the presumption of compensability mandated by Section 20(a), 33 U.S.C. §920(a).

Section 20(a) provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) That the claim comes within the provisions of this Act." 33 U.S.C. §920(a). This presumption finds its basis in the humanitarian nature of the Act. *Leyden v. Capital Reclamation Corp.*, 2 BRBS 24, 27, BRB Nos. 74-226/A (1975), *aff'd mem.* 547 F.2d 706 (D.C.

Cir. 1977). *See Hensley v. Washington Metropolitan Area Transit Authority*, 13 BRBS 182, ___ F.2d ___ , No. 79-2552 (D.C. Cir. March 17, 1981), *rev'g* 11 BRBS 468, BRB No. 78-637 (1979) (Miller, dissenting). Moreover,

> the beneficient purposes and humanitarian nature of the Act must be borne in mind when deciding whether the employer has presented 'substantial' evidence; thus doubtful questions, including factual ones like work-relatedness, must be resolved in favor of claimants.

Hensley, 13 BRBS at 185, ___ F.2d at ___ . The Section 20(a) presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 4 BRSB 466, 475, 554 F.2d 1075, 1082 (D.C. Cir.) *cert. denited*, 429 U.S. 820 (1976). In order to rebut the Section 20(a) presumption, the employer must present "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Parcons Corp. of California v. Director, OWCP*, 12 BRBS 234, 235-36, 619 F.2d 38, 41 (9th Cir. 1980). Further since this case arises under the Defense Base Act, the employer must show that the condition did not arise out of the "zone of special danger" created by claimant's conditions of employment. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). A showing that claimant's malady may also be caused by some factors which are not work-related is insufficient to rebut the presumption.

Dr. John Dunn diagnosed claimant's illness as diabetes mellitus and transient hypertension, a diagnosis assented to by Dr. Robert North. Dr. Dunn opined that the camp diet and work conditions were both causes, albeit not the only ones, in the development of claimant's symptoms. Cl. Ex. 5. The majority, relying on the testimony of Dr. North, avers that there is no causal connection between claimant's employment and his illness.

With this assertion, my colleagues ignore the well-established principle that "a aggravation of a pre-existing condition may constitute a compensable . . . injury under the Act. . . ." *Wheatley v. Adler*, 407 F.2d 307, 312 (D.C. Cir. 1968). Although Dr. North's testimony may be cited to for the statement that claimant's employment did not cause his malady, his testimony supports claimant's assertion that his employment *aggravated* these conditions.

During cross-examination by claimant's counsel, the following testimony was offered by Dr. North.

Q Dr. North, do I understand your opinion to be then that Dr. Dunn has no medical basis for his opinion, is that correct?

A Specifically there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for labile hypertension or diabetes.

Q And it's your testimony that can't affect it, too, isn't that your testimony?

A That if what?

Q That it can't affect those disorders either?

A It certainly can affect those disorders.

Hearing Transcript at 89. Dr. North later reiterated the same opinion.

Q OK.

Earlier when you was talking about diet, you took me back a little bit, but I want to make sure I understand you. You're not saying that diet can't affect bodily dysfunctions, but that you didn't see it causing bodily dysfunctions as the hypertension and as to diabetes?

A That's correct.

Hearing Transcript at 102-03.

In response to a request for an explanation of why Dr. North disagreed with Dr. Dunn, Dr. North replied as follows.

> **A** Because that doesn't fit with our current understanding in the weight of the medical evidence as to the genesis and the nature of these diseases. There are things which may be aggravated by dietary and even environmental influences but they are obviously not caused by these things because there are many many people who are exposed to the same conditions that never develop the disorder.
>
> So there has to be some other factor or factors involved in the genesis of hypertension and diabetes. In essence that's my answer.

Hearing Transcript at 129-30. Thus, the majority's reliance on Dr. North's testimony to support its contention of no causal connection is misplaced. It is clear that the employer presented no evidence specific and comprehensive enough to sever the potential link between claimant's malady and his employment. Rather, employer's medical evidence supports claimant's contention that his illnesses were work-related.

In addition, the majority's statement that "Dr. North considered claimant's ... heavy alcohol use as [a factor] aggravating his conditions" is incorrect. Majority Opinion, slip op. at 3. Although Dr. North opined that heavy alcohol use is an aggravating factor in development of hypertension and diabetes, he testified that he had no knowledge of *claimant's* alcohol use. Hearing Transcript at 132-33.

However, assuming *arguendo* that claimant did use alcohol heavily, I would still hold that the link between his illness and employment was not severed. If the conditions of employment

create a zone of special danger out of which the injury arose, then a causal connection exists. *O'Leary v. Brown-Pacific-Maxon, Inc.* I would take judicial notice that the Sinai is a desert and conducive to drinking. Accordingly, since the employer has not established otherwise, *see* 33 U.S.C. §920(a), any heavy alcohol use is attributable to claimant's work environment.

Consequently, my colleagues err in their conclusion that Dr. North's testimony constitutes substantial evidence to rebut the Section 20(a) presumption. In view of the uncontradicted testimony that diet and the work environment may aggravate conditions, I would reverse the administrative law judge's denial of benefits. *See Kicklighter v. Ceres Terminal, Inc.*, 13 BRBS 109, 118 n. 10, BRB No. 79-550 (1981).

JULIUS MILLER
Administrative Appeals Judge

Dated this 30th day
of September 1981

APPENDIX D

U.S. Department of Labor

Office of Administrative Law Judges
Hebert Federal Building
Room 909, 600 South Street
New Orleans, Louisiana 70130
Reply to the Attention of: OALJ

In the Matter of	)	
	)	
HOWARD R. CLYMER	)	
Claimant	)	Case No.
against	)	79-LHCA-1644N
E-SYSTEMS	)	
Employer	)	OWCP No.
LIBERTY MUTUAL INSURANCE COMPANY	)	2-58065
Carrier	)	
	)	

SAMUEL L. BOYD, ESQ.
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DAVID TOWNEND, ESQ.
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Before: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901, *et seq.*) as extended by the Defense Base Act (42 U.S.C. §1701, *et seq.*), hereinafter jointly referred to as the "Act." The hearing was held on September 6, 1979 in Dallas, Texas, at which time all parties were given the opportunity to present evidence, oral arguments and post-hearing briefs, which have been admitted into evidence as Claimant's Exhibit 24 and Respondents' Exhibit 13. Application for an attorney's fee, filed by Claimant's counsel, has been admitted into evidence as Claimant's Exhibit 23. This decision is being rendered giving full consideration to the entire record.

Stipulations

The parties have stipulated, and I find, as follows:

1. The Act applies;

2. The Employer/Employee relationship existed between E-Systems (the Employer) and Howard R. Clymer (the Employee) from June 16, 1976 to March 11, 1978;

3. The Notice of Controversion was filed on November 14, 1978; and

4. Claimant's annual earnings were $24,480.00.

The principal unresolved issues in controversy are:

1. Whether a compensable injury has occurred and, if so, the date thereof;

2. Whether timely notice of the injury was given to the Employer;

3. Whether Claimant has timely filed this claim;

4. The nature and extent of any disability;

5. Attorney's fee, penalties and interest; and

6. Claimant's average weekly wage.

Howard R. Clymer, fifty years of age at the time of the hearing, did not complete high school. He has spent most of his work career as a sheet metal worker. From 1957 to 1970 he operated his own sheet metal business and in 1970 he began to work for several Dallas companies as a heating and air conditioning repair man. In 1971 he again opened his own air conditioning and heating repair firm until June of 1976 when he went to work for the Employer in the Sinai. Claimant was hired to work as a heating and air conditioning mechanic although he was told from time to time he might be required to do work outside of his trade. Upon arrival at the Sinai Field Mission, Claimant spent some time unloading and setting up furniture, doing some construction and carpentry work building a 40,000 gallon water tank, all of which work he characterized "as all physical." He also helped build office structures and covered plumbing ditches, work performed from 7:30 a.m. to 5:00 p.m. in a climate described as a different type of hot weather than anything he had experienced, remarking that it was uncomfortable working in the heat. In the first five-and-one-half-months Claimant repaired only one air conditioning unit.

Claimant passed his pre-employment physical examination and testified that his health was "good" before going to the Sinai. In August of 1976 Claimant felt exhausted at the end of the day and began having headaches. On December 7, 1976 Claimant felt numbness in his right leg, in part of his right arm and the right side

of his face had a numbness. He also experienced a nauseated stomach, reporting these difficulties to the paramedics at the dispensary. He was given some pills and told to rest. The following spring or summer Claimant experienced similar difficulties and he was hospitalized in Tel Aviv for one week. Upon his discharge Claimant returned to his same employment with no restrictions (Tr. 24-58).

Claimant experienced similar physical problems in late spring or early summer of 1977 while at a Tel Aviv hotel, experiencing periodic headaches also. Thereafter, in January of 1978, while shopping in a Tel Aviv department store, his headaches started to bother him and he felt quite sick. After returning to his hotel, he called his Employer who thereupon provided a doctor who gave him some pills, telling him to rest and to return to work. However, Mr. Carl Lunquist, Employer's SFM Tel Aviv Office Manager, told Claimant to pack his suitcases for admittance to a local hospital, where Claimant remained for twelve days. Thereupon, Claimant returned to work and, on February 23 or 24, 1978, was advised he would be sent home for "further medical evaluation before my condition worsened." Claimant refused to sign a release from the Employer, returned to the United States on February 26, 1978 and sought medical treatment from Dr. Dunn the next day (Tr. 150-163).

Claimant testified he was a moderate drinker, taking "maybe two or three drinks in one day" and remarking that he was intoxicated "in a period of twenty and a half months that I was there, three or four times maybe at the most." Claimant is on a "no alcohol diet, a diabetic diet." Claimant's problems with the Internal Revenue Service have been corrected. Claimant has not worked since his return to the U.S. because Dr. Dunn has advised him not to work "until this was all under control, my illnesses and so forth, whatever it is" (163-167).

Upon cross-examination, Claimant admitted that his claim was filed on August 16, 1978, that his weight in the Sinai had increased to as high as 230 or 240 and that he now weighs 182, that his employment contract required him to perform services other than those for which he was hired, that he worked six days a week for three weeks and then had "seven days R&R" at Tel Aviv, Jerusalem, Bethlehem, Jaffa, Suez City and Cairo, Egypt. Claimant returned home for a visit in June of 1977 and then resumed his normal duties at SFM until his medical problems around January 28, 1978 in Tel Aviv, admitting that he new something was wrong with him at that time and that he went to see Dr. Dunn on February 27, 1978, the day after his return. He stated that no one had told him that his two previous attacks were job-related (Tr. 182-202).

Claimant was concerned about the I.R.S. audit in 1977. He admitted that he sometimes drank an orange Vodka, Canadian Club or scotch in his room and at other times in the SFM lounge before playing bingo. He also admitted there was a salad bar in the dining room, that fresh fruit also was available and no one forced him to eat any particular food item. Dr. Dunn has been his family doctor since 1970. The paramedics who worked in the dispensary operated by the Employer told Claimant to return to work after his January 1978 incident (Tr. 207-229). Mr. Clymer characterized Dr. Dunn as his Department of Labor-approved doctor (Tr. 237-238). Although Claimant experienced another attack in May of 1977, shortly before returning to Garland, Texas for a vacation, he did not seek medical attention at that time (Tr. 240). Claimant's first attack occurred in December of 1976 while he was in the base camp; the second attack occurred in March or May of 1977 while at a Tel Aviv hotel and the third attack occurred at a Tel Aviv department store on January 28, 1978 (Tr. 243).

Claimant, having been called as a rebuttal witness, testified that he drank beer occasionally, but not the amount attributed to him,

and that Dr. Dunn, shortly after Claimant's return to the United States, told him his diabetes might be job related (Respondents' Exhibit 6, dated April 13, 1978; Tr. 283-286).

The Employee's Claim for Compensation (Form LS-203), dated August 16, 1978, was received by the Office of Workers' Compensation Programs-Houston on August 21, 1978 (Respondents' Exhibit 10). A letter from Claimant's attorney, Samuel L. Boyd, Esq., dated November 2, 1978, was received on November 29, 1978 (Respondents' Exhibit 9).

Robert L. North, M.D., a specialist in cardiovascular diseases and internal medicine, obtained his medical degree in 1955. Dr. North, after reviewing Claimant's medical file and taking a history report, examined Claimant on April 26, 1979. At this time Claimant complained of weakness and numbness in his extremities and episodes of painful sensations also in his extremities and at times in his chest. Dr. North stated this physical examination was normal with the exception of the presence of edema or swelling of the lower extremities. Dr. North requested a neurological evaluation in view of the complaints. Dr. Stuart Black performed a thorough neurological examination, the results of which were negative. Dr. North had Claimant's tolerance for glucose or sugar tested. These tests substantiated what previous tests had documented, namely that Claimant had mild diabetes mellitus, was placed on a diet and given oral medication. Dr. North recommended psychological testing and referral to a psychiatrist, but Claimant refused.

On the basis of this and a later examination, Dr. North concluded that he "could find no satisfactory explanation or medical diagnosis to account for Mr. Clymer's symptomatology" and that his mild diabetes and intermittent high blood pressure were under control. Dr. North expressed the opinion that these conditions (i.e. mild diabetes and intermittent high blood pressure) could not be

"attributed to his occupation or to diet or to geographical location, environment, nor this sort of cause." (Tr. 58-69).

Furthermore, Dr. North did "not find any physical impairment, impairment and exercise ability coordination, anything of this sort that would preclude his employment in that field" (Tr. 70). Claimant's exercise stress test was negative, in that there was no indication of an abnormal cardiovascular response to physical exertion (Tr. 82-82). Dr. North testified that Claimant's diabetes mellitus tends to be an inherited disease and involves an insulin deficiency (Tr. 84).

Upon cross-examination, Dr. North stated that although physical stress and diet might affect diabetes, "there is no basis in medical probability that such conditions as heat, perspiration, the specific diet would be causes for labile hypertension or diabetes." Furthermore, "obesity is a factor in the development of the manifestations of diabetes and hypertension as well" (Tr. 87-89). Dr. North admitted that an improper diet of high carbohydrates, fats and high salts may affect or aggravate his hypertension and diabetes (Tr. 100-101) but denied that physical exertion in the desert sun might affect or aggravate these conditions (Tr. 102). Anxiety or use of alcohol might aggravate hypertension (Tr. 104) but "blood pressure per se is not a disease and it doesn't cause disability. It is through its affect (sic) on other organ systems that blood pressure becomes a problem and it is to prevent these affects (sic) that we treat people with high blood pressure" (Tr. 107) because "one of the consequences of sustained high blood pressure is heart failure" as well as "hardening of the arteries," stroke and kidney disease. Furthermore, "blood pressure itself does not cause symptoms or, you know, make people dizzy or anything or that sort." Hypertension and diabetes "become clinically apparent in middle-age years" (Tr. 110-112). Although Dr. North admitted "that diet and certain kinds of stress may aggravate these problems" he did not know what caused the symptoms of which Claimant was complaining (Tr. 121).

Dr. North opined that Claimant's physical examination and testing disclosed no objective evidence of brain disease, heart disease or kidney damage (Tr. 126). Excessive use of alcohol is "a risk factor, if you will, for both hypertension and diabetes or glucose intolerance." However, hypertension and diabetes are not caused by labor in the heat . . . because there are many people who are exposed to the same conditions that never develop the disorder." Claimant's overweight condition and age "are both aggravating factors." (Tr. 129-130).

Claimant's swelling of his legs "represents chronic venous insufficiency due to some unknown cause" (Tr. 134). "There is no sound scientific basis, though, to say that geography or occupation caused this" (Claimant's condition) (Tr. 136). Furthermore, Dr. North opined "that the location, the climate and whatever are purely accidental in this case and that had he remained in South Texas and that had he been given the same diet, the same body weight, the same, you know, problems with the I.R.S., however much he drank drinking the same, he would have developed the same problems at the same time. In that respect, it's his destiny" (Tr. 141). "True diabetes mellitus is something that does show a very strong family incident" and "there is no specific diet that causes hypertension or causes diabetes" and "that the geographic location and occupation in my opinion have nothing to do with the appearances of high blood pressure or diabetes mellitus in this case . . ." Furthermore, adequate physical activity and exercise are methods used to control hypertension and diabetes meilitus (Tr. 143-147).

Mr. Michael E. Kapple, Employer's Program Manager, testified that he was in charge of building an early warning system in the Sinai Desert, a system which was an out-growth of Henry Kissinger's shuttle diplomacy and was manned entirely by U.S. volunteers. Heavy construction started in February of 1976 and ran through mid-June of 1976, at which time the camp was 99 percent

completed. Cafeteria-style meals were provided the workers, meals which were designed to approximate an American type diet as closely as possible. Each person was free to select any of the items available at any meal. The Sinai weather was comparable to Texas weather with the exception of a milder winter. The location was 2300 feet on top of a mountain and there was a continuous breeze so that even the hottest days ("110 degrees Fahrenheit") were bearable. Upon his discharge from the hospital in January of 1978, Claimant worked half days for several days and thereafter it was determined to send Claimant home to be examined by his own family doctor. Thus, Employer intended that Claimant be terminated for medical reasons because he had missed a few work days and was physically unable to continue in his normal work capacity. However, Claimant would not agree to his procedure whereby he would receive 100 per cent of his contract benefits and, instead, returned to the United States on his own. In December of 1977 or January of 1978 Mr. Kapple learned that Claimant was being audited by the I.R.S., remarking that "he appeared to be quite anxious about it." Claimant never reported to him any job-related injury or occupational disease (Tr. 245-255).

Upon cross-examination, Mr. Kapple admitted that he knew Claimant had been in the hospital and that the I.R.S. audit "could have been later or earlier in time" possibly by six months. He testified that there was not "much manual labor for long term durations after approximately the middle of June 1976," remarking that there were various construction add-ons thereafter, that 70 percent or higher of Claimant's work was in the air conditioning-heating field, that special food items were prepared for certain workers at their request and that it was also possible for individuals to do their own cooking. Dr. Zaigraeff advised Mr. Kapple by medical report the nature of Claimant's medical problems in January of 1978. At that time, the two paramedics, Mr. Barnhill and Mr. Lay, reported that they also were concerned about Claimant's health (Claimant's Exhibit 7 and Tr. 256-267).

Mr. Walter S. Shavers, an employee of the Employer herein, testified that he first learned Claimant was claiming a job-related occupational disease or illness on April 13 or 14, 1978 in a phone conversation with Mr. H. H. McKelvey, Employer's insurance administrator. Mr. Shavers was not in Israel in January or February 1978 and had no idea what sort of notice had been given to the Employer in January or February 1978 (Tr. 270-273).

Mr. Gary Ford, Employer's personnel specialist, arrived in the Sinai in May of 1976 and departed in January of this year. On two or three occasions each month Mr. Ford tended bar in the PX lounge, testifying that on seven, eight or nine occasions he observed Claimant drinking six to eight beers at the bar in the course of an evening, that Claimant told him about an I.R.S. audit and that he seemed nervous about this sometime in the summer or fall of 1977, as well as a personal health problem (Tr. 274-278). Upon cross-examination, Mr. Ford admitted that he did not know how much money was involved in the I.R.S. audit, remarking that Claimant "was upset about it and he wanted some sort of solution" and that a lot of people drink when they are isolated (Tr. 278-282).

Dr. John Dunn reported on August 28, 1979 that Dr. Stuart Black's neurological evaluation was within normal limits, that Claimant's blood sugar level is now normal because of his diet, that he experiences intermittent episodes of hypertension and that Claimant's camp diet of high carbohydrates, high salt intake and work conditions "were definite factors in his medical situation" (Claimant's Exhibit 5). Dr. Dunn reported on April 13, 1978 that Claimant first saw him for this condition on February 27, 1978 and that he diagnosed hypertension and possible diabetes (Claimant's Exhibit 10). On July 18, 1978 Dr. Dunn reported that Claimant's hypertension and diabetes mellitus were under control by diet and oral medication and that he "could be considered fully employable" if neurological evaluation proved negative (Respondents' Exhibit 6). Dr. Dunn reported on August 7, 1978 that

Claimant's several episodes of numbness of the right side of his head probably "was transient ischemic attacks. These attacks had never occurred prior to his residing in Israel." Furthermore, Dr. Dunn opined that Employer's medical personnel mis-diagnosed acute coronary insufficiency, precardial pains and cirrhosis of the liver (Respondents' Exhibit 6).

On February 9, 1978 Dr. V. Zaigraeff reported that Claimant had been hospitalized on January 31, 1978 at Assuta Hospital, Tel Aviv, with a final diagnosis of (1) Essential hypertension, (2) Strain of the Myocardium and (3) Slight cirrhosis of the liver. It was reported that Claimant was overweight at 210 pounds (Claimant's Exhibit 6). On February 23, 1978 the camp paramedics reported that "Mr. H. R. Clymer should be sent home as soon as possible due to his medical condition" (Claimant's Exhibit 7). Dr. Chaim Feldman, on February 31, 1978, reported that Claimant should "stop drinking alcohol to *reduce* weight" (Claimant's Exhibit 9).

The Employer's first report of accident or occupational illness (BEC-202) reflects that Claimant did not return to work as of February 25, 1978, that his pay was stopped as of March 11, 1978, that the Carrier was notified on May 8, 1978 of this occupational illness and that Dr. Dunn diagnosed hypertension and possible diabetes on April 13, 1978 (Claimant's Exhibit 12).

On June 18, 1979 Dr. Robert L. North, Chief, Internal Medicine, Presbyterian Hospital of Dallas, reported that his examination of the Claimant on April 26, 1979 led to the conclusion that Claimant's mild diabetes and labile hypertension cannot be attributed to his occupation or residence in Israel (Respondents' Exhibit 1). On May 23, 1979 Dr. Stuart B. Black reported that Claimant's EEG was normal (Respondents' Exhibit 3). On March 2, 1978 Dr. Jack Spitzberg, a cardiologist and internist, opined that he could not determine an etiology for his problems in Israel. that "perhaps extreme anxiety at that time could have raised his blood pressure

transiently'' and that ''at this point in time I feel he is generally in reasonable health for his age and aside from possibly some anxiety attacks, I can find no evidence of organic disease.'' (Respondents' Exhibit 8). On March 16, 1978 Dr. Jack Spitzberg reported that Claimant's stress test, blood pressure, EKG and blood pressure were normal (Respondents' Exhibit 5-2). On March 17, 1978 Dr. R. J. Barner, a radiologist, reported that Claimant's adrenal sonogram demonstrated ''no adrenal masses or other abnormalities'' (Respondents' Exhibit 5-19). On March 17, 1978 Dr. T. J. Davis, a radiologist, reported ''PA and lateral views of the chest reveal the heart, pulmonary vascularity and both lung fields to be normal.'' (Respondents' Exhibit 5-20).

In a history report, dated March 17, 1978, Claimant advised medical personnel at Presbyterian Hospital of Dallas that ''he was a heavy drinker but says he stopped two months ago.'' (Respondents' Exhibit 5-7).

Findings of Fact and Conclusions of Law

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Sargent* v. *Matson Terminals, Inc.*, 8 BRBS 564, BRB No. 77-597, 77-597A (June 30, 1978); *Brandt* v. *Avondale Shipyards, Inc.*, 8 BRBS 698, BRB No. 77-103 (August 22, 1978); *Bank* v. *Chicago Grain Trimmers Association, Inc.*, 390 U.S. 454, 467 (1698), *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962). At the outset it further must be recognized that all factual doubts must be resolved in favor of the Claimant. *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Company* v. *Shea*, 406 F.2d 521 (5th Cir. 1969), *cert. denied*, 395 U.S. 921. Furthermore, it has consistently been held that the Act must be construed liberally in

favor of the Claimant. *Voris* v. *Eikel*, 345 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953); *J. B. Vozzolo, Inc.* v. *Britton*, 377 F.2d 144 (D.C. Cir. 1967). The Act provides a presumption that a claim comes within the provisions of the Act (33 U.S.C. §920(a)). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton* v. *J. Frank Kelly, Inc.*, 544 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To rebut this presumption, the employer must introduce substantial evidence to the contrary. *Butler* v. *District Parking Management Co.*, 363 F.2dk 682 (D.C. Cir. 1966). Furthermore, one must introduce facts, not speculation, to overcome the presumption of compensability. Reliance on a mere hypothetical probability in rejecting a claim is contrary to the presumption. *Steele* v. *Adler*, 269 F.Supp. 276 (D.D.C. 1967).[1]

It is, of course, well settled that a Claimant's credible subjective complaints, standing alone, are sufficient to establish entitlement to compensation. *Ruiz* v. *Universal Maritime Service Corp.*, 8 BRBS 451, 454, BRB No. 78-135 (May 30, 1978, citing *Perini Corp.* v. *Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); *Rudolph McIntosh* v. *Parkhill Goodloe Co.*, 4 BRBS 3, BRB No. 75-623 (May 17, 1976), *aff'd mem.*, 551 F.2d 1283 (5th Cir. 1977); *Barbara A. Woodham* v. *U.S. Navy Exchange*, 2 BRBS 185, BRB No. 75-105 (August 20, 1975); *Larson's Workmen's Compensation Law*, Volume 3, §79.53. "However, there must be some basis in the record to support the extent of the disability awarded." *Woodham, supra*, at 191. Furthermore, the Administrative Law Judge is permitted to rely on his own observations. *Perini Corp.* v. *Heyde, supra.*

[1] Based upon the humanitarian nature of the Act, the Act is to be interpreted liberally in favor of Claimants and Claimants are to be accorded the benefit of doubts." *David P. Harrison* v. *Potomac Electric Power Company*, 8 BRBS 313, 314, BRB No. 78-139 (May 30, 1978).

Although Section 20 contains several presumptions, including the presumption of causality, there is no presumption that the Claimant suffered an injury. *Percy L. Murphy*, v. *SCA/Shayne Brother and American Mutual Insurance Company*, 7 BRBS 309, 312, BRB No. 76-419 (February 24, 1978); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3rd Cir. 1948), *cert. denied*, 338 U.S. 880 (1949); *Young & Co.* v. *Shea*, 397 F.2d 185 (5th Cir. 1968), *rehearing denied*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969). Claimant must prove all that is not presumed. "Thus, the burden is on the Claimant to prove his injury. We do not believe the presumption of causality found in Section 20 is applicable in a case such as this because there must be proof of an injury before the presumption can arise." *Murphy, supra*, at 314.[2]

Moreover, in considering the issue of causal relationship, Claimant has the benefit of the legislative policy favoring awards in arguable cases. This Administrative Law Judge is abound by longstanding rules of judicial construction that the statute should be construed liberally in favor of claimants and that doubts should be resolved in their favor. *Swinton, supra*, at 1084; *Wheatley* v. *Adler*, 407 F.2d 307, 313-314 (D.C. Cir. 1968); *James H. Brennan* vs. *Bethlehem Steel Corporation*, 8 BRBS 419, BRB No. 77-203 (February 14, 1978). "*Swinton* holds that the Act presumes a claim to fall within its provisions, *in the absence of substantial evidence to the contrary*; that is, the employer must rebut the presumption *prima facie* with substantial countervailing evidence. *Id.* at 1081. For that rule, the D.C. Court of Appeals cited *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935). *Del Vecchio* stands as the

[2] This presumption of compensability does not apply to a claim that disability is permanent rather than temporary since the issues of nature and extent of disability are quite properly litigated without the benefit of the presumption. *David P. Harrison* v. *Potomac Electric Power Company*, 8 BRBS 313, BRB 78-139 (May 30, 1978); *Elroy A. Lewis* v. *Sun Shipbuilding and Dry Dock Company*, 8 BRBS 613, BRB 77-588 (July 24, 1978); *Huningman* v. *Sun Shipbuilding and Dry Dock Company*, 8 BRBS 141, BRB No. 77-266 (March 31, 1978).

United States Supreme Court's last extensive analysis of the Section 20 presumptions. Hence, it is binding on all administrative and judicial tribunals that oversee the Act. The *Del Vecchio* case applies the 'bursting bubble' theory of presumptions to Section 20 of the Act. According to that theory, 'the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears.' *McCormick's Handbook of the Law of Evidence*, §345 at 821 (2d ed 1972). 'Once the employer has carried his burden by offering testimony sufficient to justify a finding . . . [opposed to the presumed fact], the presumption falls out of the case . . . [Its'] only office is to control the result where there is an entire lack of competent evidence. *Del Vecchio* at 286.

"What the *Swinton* court found was that the Deputy Commissioner had failed to accord the presumption sufficient respect. The court said, 'We are satisfied that if the presumption had been honored, the Deputy Commissioner would have had to find that it was not overcome by substantial evidence.' *Swinton* at 1081-1082. That is, under the *Del Vecchio* test, the employer had failed to rebut the presumption." *Brennan, supra*, at 423-424.

What constitutes substantial evidence depends upon the facts and circumstances of each compensation claim, especially the Claimant's credibility. In *Charles F. Ethier* v. *General Dynamics Corporation*, 8 BRBS 575, BRB No. 78-287 (July 20, 1978), the Benefits Review Board, in affirming denial of a claim under the Act, ruled that an Administrative Law Judge properly considered the testimony of a physician in concluding that the Employer had dispelled the Act's Section 20(a) presumption that the claim comes within provisions of the Act and in concluding that the disability was unrelated to the accident. The Claimant had contended that the physician did not examine the Claimant in person, did not attempt to ascertain the accuracy of Claimant's accident history taken at Employer's infirmary and that, therefore, his testimony should have

been disregarded. The physician based his opinion on all available evidence of Claimant's condition and knew all the pertinent facts. Other than a short time for necessary medical attention, Claimant lost no time from work due to the injury until February 24, 1976, at which time Claimant suffered a grand mal seizure.

Once the Section 20(a) presumption is overcome by the introduction of substantial evidence, the fact-finder proceeds to evaluate the evidence introduced by the parties. *Travelers Insurance Co.* v. *Belair*, 417 F.2d 297, 301 n.6 (1st Cir. 1969); *Norat* v. *Universal Terminal and Stevedoring Corp.*, 3 BRBS 151, BRB No. 75-162 (Jan. 12, 1976). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938); *Steele* v. *Adler*, 269 F. Supp. 376 (D.D.C. 1967); *De Nichilo* v. *Universal Terminal and Stevedoring Co.*, 5 BRBS 723, BRB No. 76-327 (April 1, 1977). The statement in the Act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by the evidence. *Crowell* v. *Berson*, 285 U.S. 22, 46 (1937); *Avionone Freres, Inc.* v. *Cardillo*, 117 F.2d 385, 386 (D.C. Cir. 1940); *Goins* v. *Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968).[3] In evaluation this evidence, as indicated above, I have operated under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee because the intent of this statute is to place the burden of possible error on those best able to bear it. *Young & Co.* v. *Shea, supra*. This

[3] This presumption that employment caused the disability for which the claim is brought may be rebutted without showing any other cause of the injury. Thus, the Benefits Review Board affirmed a decision that the presumption is rebutted based on evidence which is substantial but which does not show the cause of injury. *Lovel V. Carver* v. *Potomac Electric Company*, 8 BRBS 43, BRB No. 77-460 (March 28, 1978).

statutory policy places a less stringent burden of proof on the claimant than the "preponderance of the evidence" standard which is applicable in a civil suit. *Strachan Shipping Co.* v. *Shea*, 406 F.2d 521 (5th Cir. 1969).[4]

After having reviewed all of the medical evidence and other record evidence in this case and having observed the demeanor of the witnesses, I find that Respondents have introduced substantial evidence to rebut the Section 20(a) presumption, that the presumption does not control the result herein and I will now proceed to weigh all of the evidence, resolving all doubts in favor of the Claimant herein.

Section 12 of the Act requires the Employee to give written notice of an injury within 30 days to both the Deputy Commissioner and the Employer. Section 12(a) provides as follows:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence, should have been aware, of a relationship between the injury or death and the employment.

Section 13(a) provides in part:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be

[4] Other cases wherein the Benefits Review Board has affirmed decisions dismissing compensation claims because the Employer had successfully rebutted the Section 20 presumption: *Major F. Warren* v. *International Great Lakes Shipping Company and American Mutual Liability Insurance Company*, 6 BRBS 78, BRB No. 76-428 (May 23, 1977); *Joseph C. Kirby Sr.* v. *Marriott Corporation and Liberty Mutual Insurance Company*, 6 BRBS 200 BRB No. 76-238 (May 23, 1977).

> barred unless a claim therefor is filed within one year after the injury or death . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

In applying both Section 12 and Section 13, it is well-recognized that the Act is to be liberally construed in conformance with its beneficent and humanitarian purposes in a way which avoids harsh and incongruous results. *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Kenneth W. Simonson* v. *Albina Engine and Machine Works*, 7 BRBS 100, 102, BRB No. 76-353 (December 13, 1977).

Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to prevent prejudice to them from the entertainment of stale claims. *Ingalls Shipbuilding Division, Litton Systems, Inc.* v. *Hollinhead*, 571 F.2d 272, 275 (5th Dir. 1978). This statute of limitations was designed to insure fairness to the employer. Its purpose is to prevent the revival of stale claims where "evidence has been lost, memories have faded and witnesses have disappeared." *Belton* v. *Traynor*, 381 F.2d 82 (4th Cir. 1967).

The statute of limitations contained in Section 13 of the Act is mandatory and compliance therewith has been termed "jurisdicational." *Sun Shipbuilding and Dry Dock Company* v. *Bowman*, 507 F.2d 146 (3rd Cir. 1975). Once the statute of limitations has run, the burden of proof falls upon the claimant to show an excuse for his delay in filing his claim and that the employer has not been prejudiced by the delay. *La Londe* v. *Gulf Oil Corp.*, 317 F.Supp. 692 (W. D. La. 1970). Otherwise, his claim must be time-barred. Ignorance of the law does not constitute a viable excuse for filing a claim after the limitations period has expired. *La Londe, supra*.

As previously noted, Section 13(a) provides that the time limitation begins to run when a claimant is aware or should have been aware of a relationship between his injury and his employment. Injury is defined in Section 2(2) of the Act to include occupational disease. *See* 33 U.S.C. §902(2). Thus, the crucial question for purposes of Section 13(a) is when did Claimant become aware of a relationship between his hypertension and his employment. In *Stark* v. *Lockheed Shipbuilding and Construction Co.*, 5 BRBS 186, BRB No. 75-253 (December 8, 1976), the Board extensively analyzed the meaning of the term "aware" as it is used in Section 13(a) of the Act. The Board concluded that in cases of occupational disease and latent injury, "aware" means "to have received knowledge of the work-related nature of the claimant's condition from a physician or other competent diagnostician." *Stark*, *supra*, at 195. The Board further concluded that the phrase "or in the exercise of reasonable diligence should have been aware" places a duty on the claimant to seek diagnostic confirmation of the nature and cause of his condition but that this duty does not arise until claimant has reason to believe that the condition "will or may well reduce his wage earning capacity." Furthermore, once a claimant has obtained a professional diagnosis, he will be considered "aware" for purposes of Section 13(a) and the time limitation of that provision will begin to run. *See Stancil* v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970); *Washington* v. *Cooper Stevedoring of La., Inc.*, 556 F.2d 268 (5th Cir. 1977); *Aerojet-General Shipyards, Inc.* v. *O'Keefe*, 413 F.2d 792 (5th Cir. 1969).[5]

However, the Act also sets forth an exception to Section 13(a). Section 30(a) of the Act, 33 U.S.C. §930(a), provides that the

[5] The date on which a claimant is informed by his doctor of the relationship between his work and his disability is significant but it is not always controlling, especially where there is other evidence that claimant was aware, or in the exercise of reasonable diligence should have been made aware, of this relationship at an earlier date. *Harold Sicker, Sr.* v. *Muni Marine Company and State Insurance Fund*, 8 BRBS 268, 272, BRB No. 77-470 (April 27, 1978); *Morris W. Vaughan* v. *Washington Metropolitan Area Transit Authority*, 7 BRBS 264, BRB No. 76-115 (December 30, 1977).

employer must file a report containing certain specified information within ten days from the date of the injury or ten days from the date employer has knowledge of the injury. Section 30(f) of the Act, 33 U.S.C. §930(f), provides that if the employer had knowledge of the injury, failure to file the report required by Section 30(a) will toll the Section 13(a) limitation period regardless of whether the claim would otherwise be barred.[6]

This case does not involve an incorrect diagnosis of a physician which would, in effect, toll the statute of limitations. If the diagnosis were incorrect and the Claimant relied upon it, then the one year statute of limitations does not begin to run until the claimant "realized, or should have first realized, that his ailment was job related." *Sun Shipbuilding and Dry Dock Company* v. *Bowman*, 507 F.2d 46 (3rd Cir. 1975); *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952); *Stancil* v. *Massey, supra; Washington* v. *Cooper Stevedoring, supra; Bernice Jackson* v. *Navy Exchange Service Center and Community Union Insurance Company*, 9 BRBS 437, BRB no. 77-374 (December 22, 1978).

In view of the foregoing, I conclude and find that Claimant became "aware, or by the exercise of reasonable diligence should have been aware," based upon a professional opinion of a medical doctor on December 7, 1976 (Claimant's Exhibit 4), that he had intermittent labile hypertension and, consequently, the Section 12(a) and 13(a) time limitations started to run at that time (i.e. December 7, 1976). I further find that Claimant's claim for workmen's compensation benefits on August 21, 1978 was not timely filed.[7]

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[6] An employer must know of the relationship of the employment to an injury or illness in order for the knowledge requirements of Sections 12(d) and 30(f) of the Act to be applied against the employer. *Strachan Shipping Company, et al* v. *Willie Davis and Director, OWCP* 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978).

[7] I am aware that an employee need not notify his employer of a compensation injury in accordance with Section 12(a) of the Act "until he knows or reasonably should know that he has received an injury, arising in the course of employment, that disables him from future employment." *Bath Iron Works Corporation and Commercial Union Assurance Company* v. *James P. Galen and Director, OWCP*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979).

However, assuming, *arguendo*, that the claim herein was timely filed, I will now consider whether Claimant's hypertension and diabetes mellitus are compensable disabilities under the Act.

Based upon the totality of the record, I conclude and find that Claimant's diabetes mellitus was first reported in writing by Dr. Dunn on April 13, 1978. On December 7, 1976, at which time Claimant's hypertension was first diagnosed, it was also reported that Claimant's routine laboratory examinations, ECG and EEG were normal. I also accept the diagnosis by Dr. V. Zaigraeff, on February 9, 1978, the Claimant had essential hypertension, myocardial strain, slight cirrhosis of the liver from alcohol intake and was overweight at 210 pounds (Claimant's Exhibit 7). At this time Claimant was placed on a strict diet — "no fats, no salts, no spices, no alcohol." I accept the diagnosis of Dr. Dunn that Claimant had diabetes based upon a physical examination on February 27, 1978 (Claimant's Exhibit 10). On March 17, 1978 Claimant advised medical personnel at Presbyterian Hospital of Dallas that he had intentionally lost twenty-two pounds while working in Israel. (Respondents' Exhibits 5-7). Therefore, I find that Claimant, while working in Israel, weighed as much as 232 pounds, weight which was entirely too heavy for his bodily frame (See Claimant's Exhibit 2, a photograph of the Claimant and others in front of the Sinai Field Mission).

I accept the opinions of Dr. Robert L. North, an eminent specialist in cardiovascular and internal medicine, who was subjected to excellent, thorough and searching cross-examination and who testified forthrightly that Claimant's intermittent hypertension and mild diabetes mellitus were not employment-related and could not be attributed to his occupation, his diet, geographical location or work environment, that he (Dr. North) did not find any physical impairment which would preclude his return to his previous employment, that diabetes mellitus is an inherited disease, that Claimant's hypertension and mild diabetes were under control by diet and medication, that high blood pressure *per se* is not a disease and does not cause disability, that hypertension and diabetes become clinically apparent in middle-age years and that Claimant

even if he had remained in South Texas would have developed the same problems at the same time because "(i)n that respect, it's his destiny." I also accept Dr. North's opinion that adequate physical activity and exercise are methods used to control hypertension and diabetes mellitus. Therefore, Claimant's manual labor might actually have had a therapeutic effect, instead of the alleged debilitating or aggravating effect claimed herein.

I also accept the diagnosis that Claimant had extreme anxiety and that this condition, together with his family problems, and isolated living, the I.R.S. audit and personal living habits, especially the excessive use of alcohol and his obesity contributed to his hypertensive condition and diabetes mellitus.

Furthermore, it is noted that Claimant's last two attacks occurred while he was away from the Sinai Field Mission and in Tel Aviv, enjoying his week's vacation at the "R & R" facility provided by the Employer. While it may be merely coincidental, I find this to be most significant, especially in view of his admission against interest, in a medical history report on March 17, 1978, that "he was a heavy drinker" but stopped two months ago (Respondents' Exhibit 5-7).

I also credit Mr. Kapple's testimony as to construction and functioning of the Sinai Field Mission, the nature of Claimant's duties there, the meals provided, the climate in the Sinai and the work environment. Furthermore, I also credit Mr. Ford's testimony as to Claimant's drinking habits while Mr. Ford was tending bar at the lounge.

I also accept Dr. Black's opinions that Claimant's neurological examination was normal. I credit the opinions of Dr. Spitzberg that he could find no evidence of organic disease, that he could not determine an etiology for his problems in Israel and that Claimant is in reasonable health for his age.

I am well aware of the well-settled doctrine that an employer takes a workman "as is" and if the workman has a pre-existing condition which is accelerated, aggravated or which manifests itself as the result of exertion incidental to the work required, a compensable injury results even though such exertion may not have harmed a person not suffering from the particular infirmity. *J. B. Vozzolo, Inc.* v. *Britton, supra*, at 148. "Also, the aggravation of the pre-existing back condition by the 'insult' to the Claimant's back which arose out of and in the course of his employment constituted injury under the Act." *John H. Rasinski* v. *I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company*, 7 BRBS 102, BRB No. 77-277 (February 28, 1978). I am not persuaded that the record before me contains any such evidence showing causality between Claimant's present problems and his employment. I, therefore, find that Claimant suffered no compensable injury while employed by E-Systems. As the Benefits Review Board pointed out in *Lennart V. Carlson v. Bethlehem Steel Corporation*, 8 BRBS 486, 488, BRB No. 78-247 (June 20, 1978): "Claimant's employment with Bethlehem Steel Corporation only furnished a convenient occasion to demonstrate to Claimant that his severly (sic) advanced degenerative osteoarthritis involving both knees will no longer tolerate any further weight-supporting activity, particularly climbing vertical ladders, compensation must be and is hereby denied."

The concept of an occupational disease is aptly expressed by the following quotation:

> "It is not the intent of this statute to create a general health insurance program. The inclusion of occupational diseases is limited to maladies resulting from working conditions which are peculiar to the calling and are more hazardous than those encountered in ordinary living." *Collins* v. *Lackland Army & Air Force Exchange Service*, 3 ARBS 61 (ALJ) October 30, 1975.

On the basis of the totality of the medical evidence and other record evidence and having observed the demeanor of the witnesses, I find and conclude that Claimant's hypertension and diabetes mellitus were not caused, triggered, aggravated or exacerbated by his employment or the work environment. I further find and conclude that Claimant's hypertension and diabetes mellitus would have occurred irrespective of his employment in the Sinai and would have occurred had he remained in the United States working at an occupation not subject to the jurisdiction of the Act. The diabetes mellitus is the natural progression of the Claimant's pre-disposition. To use Dr. North's words, "It's his destiny." There is no credible evidence that Claimant's hypertension is work-related. It is probably the result of his lengthy isolation from his family, the I.R.S. audit and his personal living habits.

Although Claimant properly argues that the Act should be interpreted liberally, it is well-settled that "plain terms of the statute may not be disregarded under the guise of interpreting it liberally." *Eikel* v. *Voris, supra,* at 333; *Pillsbury* v. *United Engineering Co.,* 342 U.S. 197, 200 (1952).

Based upon the totality of the record and the foregoing Finding of Fact and Conclusions of Law, it is determined that the claim must be denied. As I have ruled that Claimant has not sustained a compensable disability under the Act, his attorney is not entitled to an attorney's fee assessed against the Respondents.

ORDER

The claim for benefits under the Longshoremen's and Harbor Worker's Compensation Act, as extended by the Defense Base Act, filed by Howard R. Clymer is hereby DENIED.

DAVID W. DI NARDI
Administrative Law Judge

Dated: November 30, 1979
New Orleans, Louisiana

CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 1979 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Eighth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Howard Clymer, 4202 Colgate, Garland, Texas 75042
Claimant

E-Systems Incorporated, P.O. Box 1056, Greenville, Texas 75401
Liberty Mutual Insurance Company, 2530 Walnut Hill, Dallas, Texas 75229
Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following:

Judge David Di Nardi, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211, Samuel Boyd, Esquire, 5744 LBJ Freeway, Dallas, Texas 75240, John William Payne, Esquire, 1700 Republic National Bank Bldg., Dallas, Texas

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Deputy Commissioner
Eighth Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX E

OMB Approval No. 44-R1275

EMPLOYEE'S CLAIM FOR COMPENSATION

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

1. OWCP No.

2. Carrier's No.

SEE INSTRUCTIONS ON REVERSE

3. Name of person making claim (Type or print): First: Howard; Middle initial: R.; Last: Clymer

4. Date of injury (Month/day/year): Manifestation of disease first reported 1/78

5. Claimant's address (Number, street, city, state, ZIP code): 4202 Colgate, Garland, Texas 75042

6. Marital status: Married

7. Sex: ☒ Male ☐ Female

8. Age or date of birth (Month/day/year): Aug. 1, 1929

9. SOCIAL SECURITY number (May be required by law): 458 34 1109

10. Did injury cause loss of time beyond day or shift of accident? ☒ Yes ☐ No

11. On date of injury, was person: ☐ A.M. ☐ P.M.

12. Hour began work: ☐ A.M. ☐ P.M.

13. Hour of accident: ☐ A.M. ☐ P.M.

14. Did you stop work immediately? ☐ Yes ☐ No

15. Date and hour pay stopped: 1-11-78 ☐ A.M. ☐ P.M.

16. Date and hour returned to work: Still off; indefinite duration

17. Occupation (Job title; duties performed): Air Con/Heating Mechanic

18. Injured while doing regular work? ☐ Yes ☒ No (If "No," explain in Item 24)

19. Wages or earnings when injured (Include overtime allowances, etc.): $

20. Weekly: $

21. Total earnings during year immediately before injury: $24,480.00

22. Has 3rd party or other claim been made because of this injury? ☒ Yes ☐ No subject to this claim

23. Number of years you worked for this employer: 11 mos

24. Number of days usually worked per week: 6

25. Name of supervisor or employer at time of accident: G. D. Wheatley

26. Exact date supervisor or employer knew of occup. disease manifestation 1/78

27. Were you employed elsewhere during the week injured? ☒ No ☐ Yes (If "Yes," state where and what on reverse.)

28. Exact place where accident occurred (Street address, city, town, Name of vessel, pier, terminal, etc.): Sinai Buffer Zone Israel

29. Describe in full how the accident occurred (Before the events which resulted in the injury or occupational disease): Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. (If more space is needed, continue on reverse.) On Jan. 30, 1978 Mr. Clymer visited Dr. Chaim Feldman in Tel Aviv Israel at which time his condition was diagnosed as hypertension & coronary insufficiency. April 13, 1978 John Dunn, M.D. Richardson, Tex. diagnosed his condition as hypertension - possible diabetes; disabilities attributed to the work environment & diet provided by the employer. (See reverse side)

30. Nature of injury (Name part of body affected--fractured left leg, bruised right thumb, etc. If there was a loss or loss of use of a part of the body, describe.): Unknown, see line 24.

31. Have you received medical attention for this injury? see reverse ☒ No ☐ Yes (If "Yes," give name and address of doctor, clinic, hospital, etc.) Only partial attention. Insurance carrier ceased Assistance without cause in March, 1978.

32. Have you returned by a physician of your choice? once returned to U.S. by ☒ Yes ☐ No employer.

33. Has such treatment been provided by employer? ☒ Yes ☐ No thru 3/78

34. Are you still disabled on account of this injury? ☒ Yes ☐ No

35. Have you worked during the period of disability? ☐ Yes ☒ No

36. Have you received any wages since becoming disabled? ☐ Yes ☒ No (If "Yes," give dates on reverse.)

37. Has injury resulted in permanent disability, amputation or serious disfigurement? ☒ Yes (Describe on reverse.) ☐ No

38. Name of employer (Individual or firm named): E-Systems, Greenville Division

39. Nature of employer's business: Early Warning System Sinai

40. Address of employer (Number, street, city, state, ZIP code): P. O. Box 1056, Greenville, Texas 75401

41. If accident occurred outside the U.S., state whether you are a U.S. citizen: ☒ Yes ☐ No

42. I hereby make claim for compensation benefits, necessary and medical, under the Defense Base Act.

Signature of claimant or person acting in his or her behalf: Howard R. Clymer by Ronald E. Reid Attorney

43. Date of this claim (Month/day/year): 8/[illegible]/78

Section 31 of the Longshoremen's Act, 33 U.S.C. 931, provides, as follows: Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

ATTORNEY FOR EMPLOYEE

Form LS-203
(Rev. Mar. 19[illegible])

INSTRUCTIONS

- Use this form to file a claim under any one of the following laws:

  Longshoremen's and Harbor Workers' Compensation Act
  District of Columbia Workmen's Compensation Act
  Defense Base Act
  Outer Continental Shelf Lands Act
  Nonappropriated Fund Instrumentalities Act

- Applicant may leave items 1. and 2. blank.

- No benefit, other than medical, need be paid under the appropriate law unless a claim therefor is filed within one year after the injury or death *(33 U.S.C. 913(a))*. If compensation has been paid without an award, a claim may be filed within one year after the last payment. The time for filing a claim does not begin to run until the employee or beneficiary knows, or should have known by the exercise of reasonable diligence, of the relationship between the employment and the injury. To file a claim for compensation benefits, complete and sign two copies of this form and send or give both copies to the Office of Workers' Compensation Programs Deputy Commissioner in the city serving the district where the injury occurred. District offices of OWCP are located in the following cities.

Baltimore	Denver	Kansas City, Mo.	Philadelphia
Boston	Honolulu	New Orleans	San Francisco
Chicago	Houston	New York	Seattle
Cleveland	Jacksonville	Norfolk	Washington, D.C.

Use the space below to continue answers. Please number each answer to correspond to the number of the item being continued.

24, 25. Prior to his employment in Israel by E-Systems, the employee was in good health. Although hired as an Air Conditioning/Heating Mechanic, he was utilized as a manual laborer for more than six months at the age of 46, in the destructive desert heat. The combination of the stress of the labor on his body and the high fat diet wholly controlled and provided by the Employer resulted in grave circulation disfunctions and a possible diabetic condition. Because of the gravity of the disability he can no longer work in his field, nor can he perform any job requiring any physical exertion. Without the insurance carrier's cooperation he is not getting critical medical attention and treatment. He will not be employable in any endeavor until his condition can be finally determined and treated.

PRIVACY ACT OF 1974 NOTICE

In accordance with the Privacy Act of 1974 (Public Law No. 93-579, 5 U.S.C. 552a), you are hereby notified that: (1) The Longshoremen's and Harbor Workers' Compensation Act, as amended and extended (33 U.S.C. 901 et seq.) is administered by the Office of Workers' Compensation Programs of the U.S. Department of Labor. In accordance with this responsibility, the Office receives and maintains personal information on claimants and their immediate families. (2) The information will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons in handling matters relating, directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the individual claimant, or have complied with the provisions of 20 CFR 702. (4) Furnishing all requested information will facilitate the claims adjudication process, and the officials of any providing all or any part of the requested infor[illegible] may delay the process, or result in an [illegible]'s decision or a reduced level of benefits (disclose[illegible]). [illegible] a social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.

No. 83-388

In the Supreme Court of the United States

OCTOBER TERM, 1983

E-SYSTEMS, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND HOWARD R. CLYMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the court of appeals properly applied the substantial evidence test in reversing an administrative denial of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-388

E-SYSTEMS, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND HOWARD R. CLYMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7), the opinion of the Benefits Review Board (Pet. App. C1-C11), and the opinion of the administrative law judge (Pet. App. D1-D18) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1982. A petition for rehearing was denied on June 14, 1983 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on August 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1976, petitioner E-Systems, Inc., employed Howard Clymer as a heating and air-conditioning mechanic at its Sinai Field Mission in the Sinai Peninsula (Pet. App. B2, C2, D3). Clymer suffered no symptomatic medical problems when he began working for E-Systems and a pre-employment physical disclosed none (*id.* at B2, D3). Upon his arrival in Israel, Clymer performed very little heating and air-conditioning work; instead, he performed manual labor and construction work from 7:30 a.m. to 5 p.m. in the hot climate of the Sinai (*ibid.*).

Two months after he arrived in Israel, Clymer began experiencing physical difficulties (Pet. App. B2, D3). Over the next year and a half, he suffered episodes of exhaustion, nausea, numbness of the right arm and right side of the face, and intermittent headaches (*id.* at B2, C2, D3). In December 1976, he was hospitalized and diagnosed to be suffering from transient hypertension with possible cerebral ischemia (*id.* at C2, D3, D4). In January 1978, at the recommendation of E-Systems personnel, Clymer was again hospitalized, this time for 12 days (*id.* at B3, C2, D4).

The next month, at the direction of E-Systems, Clymer returned to the United States for medical evaluation and treatment (Pet. App. B3, C2, D4, D9, D11). His regular physician, Dr. John Dunn, diagnosed Clymer as suffering from disabling hypertension and diabetes mellitus (*id.* at B3, C2). Dr. Dunn concluded that work conditions, environment, and diet were contributing causes of these disabilities, and he advised Clymer not to return to work (*id.* at B3, B6, C2, D4). Dr. Robert L. North, who examined Clymer once, on April 26, 1979, 16 months after he had returned to the United States, agreed that Clymer had hypertension and diabetes, but could not ascertain the cause of these illnesses (*id.* at D6-D8). According to Dr. North, the conditions

could have been aggravated by dietary and environmental influences, but had not been caused by them (*id.* at B5, D6-D7).

2. In August 1978, Clymer filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. 1651 *et seq.* (Pet. App. B3, C2, D6, E1-E2). He alleged that the desert heat, stress of manual labor and the high-fat diet petitioner provided[1] resulted in "grave circulation disfunctions and a possible diabetic condition" (*id.* at E1-E2). After a hearing, the administrative law judge held that Clymer's claim was time-barred by the LHWCA's notice of injury provision and statute of limitations, 33 U.S.C. 912(a), 913(a) (Pet. App. D14-D15), and that, alternatively, Clymer's hypertension and diabetes mellitus "were not caused, triggered, aggravated or exacerbated by his employment or the work environment" (*id.* at D17). With one member dissenting, the Benefits Review Board affirmed, holding that substantial evidence supported the finding that Clymer's condition was not related to his employment (*id.* at C3).[2]

3. The court of appeals reversed in an unpublished opinion (Pet. App. B1-B8). The court concluded that the administrative law judge's finding that Clymer's condition had not been aggravated by his working conditions was not supported by substantial evidence (*id.* at B4-B5). The court observed that Dr. Dunn's opinion regarding the aggravation of Clymer's condition was uncontradicted inasmuch as Dr. North, upon whose testimony the administrative law judge had relied, also stated that such an aggravating effect

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[1]Clymer received cafeteria style meals from E-Systems while in its employ (Pet. App. D6).

[2]The Board did not decide whether the claim was time barred (Pet. App. C4).

was possible (*ibid.*). The court then held that there was no substantial evidence to support the administrative law judge's finding that Clymer knew or had reason to know that his injury was employment-related in December 1976 (*id.* at B6-B7). The court concluded that Clymer had no reason to suspect that his condition was work-related until April 1978, when he received Dr. Dunn's diagnosis (*ibid.*). Since Clymer had notified E-Systems of his claim in April 1978, and had filed his claim in August 1978, the court held that the claim was timely under both 33 U.S.C. 912(a) and 913(a) (Pet. App. B6-B7). Finally, because "[t]he [administrative law judge's] findings do not provide a sufficient basis for an evaluation of the extent of Clymer's disability claim," the court remanded the case for a determination of this factual issue (*ibid.*).

ARGUMENT

Petitioners' claim does not merit further review. The decision below does not conflict with any decision of this or any other court, and does not involve an important question of federal law requiring resolution by this Court. The decision of the court of appeals, in fact, does not even finally dispose of this matter; the court remanded the case for further findings on the issue of disability. Should petitioners be dissatisfied with the ultimate determination of the disability issue, they can seek appellate review at that time. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review cases that have been remanded by the courts of appeals for further factual development. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893).

1. Petitioners' contention (Pet. 9-11) that the decision below conflicts with *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608 (1982), is erroneous. Contrary to petitioners' assertion (Pet. 9), the court of appeals did not disregard the requirement (455 U.S. at 615) that an injury or illness must be caused by employment in order to come within the coverage of the Act. Rather, the court merely applied the well-established principle, not affected by this Court's holding in *U.S. Industries*, that aggravation of a preexisting condition can be an "injury" caused by employment. See, *e.g.*, *Bludworth Shipyard, Inc.* v. *Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983); *Volpe* v. *Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982); *Hensley* v. *Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 268 (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982); *Gardner* v. *Director, Office of Workers' Compensation Programs*, 640 F.2d 1385, 1389 (1st Cir. 1981); *Cordero* v. *Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).[3] Thus, the court's examination of the record to determine whether substantial evidence existed to rebut the statutory presumption that Clymer's hypertension and diabetes were

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[3]Petitioners' reliance (Pet. 10) on *Southern Stevedoring Co.* v. *Henderson*, 175 F.2d 863 (5th Cir. 1949), to demonstrate that the Fifth Circuit has regularly ignored the causation requirement is unfounded. In that case the court found the employee's death compensable where it was hastened by the necessity of his climbing a ladder after suffering a heart attack. The court based its holding on the fact that the conditions of employment were the precipitating cause of death. 175 F.2d at 866. Indeed, in *Bludworth Shipyard, Inc.* v. *Lira*, 700 F.2d at 1049, the Fifth Circuit explicitly noted, citing *U.S. Industries*, that the words "arising out of," used in the definition of "injury," 33 U.S.C. 902(2), "instruct that the employment must have caused the injury." No review is necessary, therefore, to correct the Fifth Circuit's understanding of the law.

aggravated by his employment (33 U.S.C. 920(a)) did not conflict with *U.S. Industries*.[4]

2. Petitioners also contend (Pet. 11) that the court of appeals erroneously applied the statutory presumption of compensability (33 U.S.C. 920(a)) to an injury not actually claimed by Clymer. See *U.S. Industries*, 455 U.S. at 612-615. This contention is unpersuasive; the court of appeals did not apply the presumption "to a claim that was not fairly supported by the existing claim or by the evidentiary record" (*U.S. Industries*, 455 U.S. at 614 n.7).[5] Clymer's

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[4]Contrary to petitioners' assertion (Pet. 13), the court of appeals, in performing this substantial evidence review, did not "substitute[] its judgment for that of the fact finder." The court acknowledged the limited scope of its review (Pet. App. B4) and rested its conclusion on the uncontradicted evidence that Clymer's diet and work environment had aggravated his medical problems (*id.* at B4-B5). Because the court neither " 'misapprehended [n]or grossly misapplied' " the substantial evidence test, review of that factual question is not warranted. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Similarly, petitioners' claim (Pet. 14) that the court of appeals impermissibly reversed the administrative law judge's finding that Clymer had failed to prove disability does not merit review. The court did not disturb the finding that Clymer was not permanently and totally disabled, but instead remanded the case for a determination whether Clymer suffered total temporary, permanent partial or temporary partial disability. As the court explained (Pet. App. B7), "[t]he evidence of record points to the existence of a period of disability, however, we are unable to fathom how much or how long." The accuracy of this observation can hardly be denied since E-Systems terminated Clymer for medical reasons (Pet. App. D9). Thus, in remanding the case, the court of appeals neither contravened the findings supported by substantial evidence, nor impermissibly shifted the burden of showing the availability of work to the employer (Pet. 14).

[5]In *U.S. Industries*, the employee's claim recited only that his injury had occurred one day when he was lifting certain heavy objects at work. The administrative law judge found that this incident never occurred. The court of appeals thereafter erroneously created its own theory of recovery — that the employee suffered an injury at home in bed — and

claim plainly encompassed aggravation of a pre-existing condition. Clymer specified in his claim that "the destructive desert heat," "the stress of the labor" and a "high fat diet" resulted "in grave circulation disfunctions and a possible diabetic condition" (Pet. App. E2); petitioners' witness Dr. North testified without objection on cross-examination regarding the aggravation issue; and the administrative law judge addressed that theory in his decision (Pet. App. D16).[6] Unlike *U.S. Industries*, therefore, the court of appeals here did not create a theory of recovery unanticipated by the employer and not advanced by the claimant. Cf. *Champion* v. *S & M Traylor Brothers*, 690 F.2d 285, 296 (D.C. Cir. 1982) (statutory presumption of compensability applies where claim of causal connection was made before administrative law judge and court of appeals).

3. Petitioners finally assert (Pet. 15-16) that the court below erred in not sustaining the administrative law judge's determination (Pet. App. D15) that Clymer's claim was time barred because he should have been aware of a relationship between the injury and his employment on

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then applied the statutory presumption that the injury was work related. This Court held that "[e]ven if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made." 455 U.S. at 613.

[6]Petitioners' argument (Pet. 11) that Clymer based his claim on "occupational illness," rather than aggravation of a pre-existing disorder, creates a distinction without a difference. Whether viewed as "an accidental injury" or "occupational disease," the injury here — symptomatic hypertension and diabetes — still arose out of employment if work conditions aggravated or precipitated the symptoms. And this is precisely the theory upon which Clymer based his case, through the testimony of Dr. Dunn and cross-examination of Dr. North. Aggravation of a pre-existing weakness may also be viewed as an occupational disease. See *Gardner* v. *Director, Office of Workers' Compensation Programs*, 640 F.2d 1385, 1389-1390 & n.3 (1st Cir. 1981); 1B Larson, *The Law of Workmen's Compensation* § 41.63 (1982).

December 7, 1976, when he was diagnosed to be suffering from intermittent labile hypertension. See 33 U.S.C. 912(a) and 913(a). But, as the court below noted (Pet. App. B7), Clymer had no reason to suspect his condition was employment-related until April 1978 when he received Dr. Dunn's diagnosis. The court did not, as petitioners assert (Pet. 15), create a rule of law that the statute of limitations does not begin to run until the employee is told by a doctor that his condition is employment related. It held only that there was no substantial evidence to support an earlier date in this case, a factual question that plainly does not require this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

NO. 83-388

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

E-SYSTEMS, INC.,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

HOWARD R. CLYMER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES BELOW

In the Court below, the Petitioners, E-Systems, Inc. and Liberty Mutual Insurance Company, were the Petitioners/Appellees; the Respondent, Howard R. Clymer, was Petitioner/Appellant, and the Director, Office of Workers' Compensation Programs, United States Department of Labor, was the Respondent/Appellee.

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STATEMENT OF FACTS

Respondent, Howard R. Clymer, in June of 1976, closed down his own heating and air conditioning business and began employment with E-Systems, Inc. as a heating/air conditioning mechanic. He was assigned to the Sinai Field Mission in Israel. (Tr. at 29-33).

Mr. Clymer arrived in Israel to find that he was not being utilized in the capacity for which he had been hired, but was directed to perform manual labor. (Tr. at 38-43, 45-46).

The record reflects that Mr. Clymer was an excellent employee, not a malingerer nor a malcontent and was commended by his superior for his cooperation toward achieving the objective of the Mission in Israel. (Tr. at 43-44).

After approximately six months of duty involving construction and related manual labor, Mr. Clymer first experienced the symptoms which related to his disability. At the time of the manifestation of his dysfunctions, Mr. Clymer was taken to the Sinai Field Mission Health Clinic. There, the E-Systems paramedics noted that the patient was having dizzy spells, numbness, above normal blood pressure, was not a heavy drinker, was not a smoker, and was not a complainer (emphasis in original medical record), and that a medical doctor ordered that Mr. Clymer be moved to the nearest full medical facility at once. (Tr. at 49, 243; Sinai Field Mission Health Record, dated 7 Dec 76 and submitted by letter on October 15, 1979). There is no dispute that Mr. Clymer was totally dependent on E-Systems at all times while working at the isolated Sinai Field Mission which was located in the Sinai Desert.

Mr. Clymer was hospitalized for a week at Rafidine which was the nearest medical facility (Tr. at 55) and then returned to work at the Sinai Field Mission. After his return he began to perform more duties related to his heating/air conditioning work. (Tr. at 57-58).

Mr. Clymer continued to experience intermittent headaches and nausea and periodically visited the paramedics for

medical supervision and treatment. (Tr. at 155).

A second disabling episode occurred in mid-1977 and a third attack occurred in January of 1978. This last episode resulted in hospitalization for twelve days. (Tr. at 155-160). E-Systems medical personnel determined that it was essential that Mr. Clymer be medically evacuated from the Sinai Field Mission for proper medical testing in the United States. (Tr. at 159-160). Mr. Clymer was not returned to the United States for substandard work performance or for any reason other than his remarkable medical deterioration.

Immediately upon his return to the United States, Mr. Clymer reported to Dr. Dunn, his treating physician, who conducted medical tests which resulted in a diagnosis of indefinite disability. Testimony at the hearing before the Administrative Law Judge indicated that Mr. Clymer's condition had not changed significantly since his return from Israel in February of 1978, with the exception of some control of the blood sugar level by diet restriction.

Dr. Dunn testified that the camp diet at the Sinai Field Mission, consisting of high carbohydrate and high salt intake and the work environment, which involved excessive heat and physical stress, were both contributing causes in the development of Mr. Clymer's medical dysfunctions. Petitioner's medical expert testified that Respondent had a pre-existing disposition toward these dysfunctions. (Tr. at 141-43).

The Petitioner's medical expert, Dr. Robert L. North, reviewed Mr. Clymer's medical record and very briefly consulted with him prior to testifying in the hearing before the Administrative Law Judge. (Tr. at 123). Dr. North testified that Mr. Clymer's medical problems, which included hypertension and diabetes, were things that may be aggravated by dietary and even environmental influences, although he opined that they would not be caused by such. Dr. North, who had no reason to doubt the Respondent's medical complaints, was unable to define any medical condition as a diagnostic basis to account for Mr. Clymer's

symptoms. (Tr. at 94-95, 112, 121).

Mr. Clymer filed a claim for compensation under the LHWCA and a formal hearing was convened before an Administrative Law Judge (ALJ) in Dallas, Texas. The ALJ determined that Mr. Clymer had failed to prove injury caused by employment and that Mr. Clymer's claim was not timely filed. The decision of the ALJ was affirmed by the Benefits Review Board, but on different grounds; that being that Mr. Clymer had failed to establish a causal link between his employment and the disability asserted.

An appeal was taken to the Court of Appeals for the Fifth Circuit which reversed the decisions of the Benefits Review Board and the ALJ and found as a matter of law that the conclusion of the ALJ on the issue of aggravation was not supported by the requisite quantum of evidence, and the admissions of the Petitioner's medical expert conclusively established the Respondent's right to relief under the LHWCA.

The Fifth Circuit also held that since no medical evidence was offered by E-Systems addressing whether Mr. Clymer's condition prevented him from earning comparable wages, it was necessary to remand the cause for further proceedings.

Thereafter, Petitioners, E-Systems and Liberty Mutual Insurance Company, upon being denied a petition for rehearing, filed a petition for a writ of certiorari to review the decision of the United States Circuit of Appeals for the Fifth Circuit.

To date, Mr. Clymer continues to suffer his medical dysfunctions rendering him unable to either seek or perform gainful employment for the support of this family. He has remained unemployable since his medical evacuation by E-Systems from the Sinai Field Mission in early 1978. The opinion of the Fifth Circuit properly rejected the inopposite arguments of the Petitioners herein. The withholding of benefits to which Mr. Clymer's family has been entitled for the last five years has had devastating ramifications, both financially, medically and spiritually.

The Petition for Certiorari should be denied.

SUMMARY OF ARGUMENTS PRESENTED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

The Fifth Circuit's determination that the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) provides benefits if employment conditions aggravate a pre-existing condition resulting in disability does not conflict with the Supreme Court's decision in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, __ U.S. __, 102 S.Ct. 1312 (1982).

II.

The Petition for a Writ of Certiorari sets forth no substantial question of public importance nor does it present grounds for conflict jurisdiction which would warrant certiorari review by this Honorable Court.

ARGUMENT

POINT I

The Fifth Circuit's determination that the LHWCA provides benefits if employment conditions aggravate a pre-existing medical condition resulting in disability does not conflict with the Supreme Court's decision in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, __ U.S. __ 102 S.Ct. 1312 (1982).

The first basis in Petitioner's Petition for a writ of certiorari is the contention that a conflict exists between the Fifth Circuit's decision below and this Court's opinion in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, supra. Interestingly, Petitioner's claim that the Fifth Circuit did not review or cite to this court's decision in U. S. Industries, even though the decision was rendered almost nine months before the Fifth Circuit decided this case. To the contrary, the Fifth Circuit expressly rejected Petitioner's exhaustive arguments on this contention in rejecting the Petitioner's motion for rehearing.

In U. S. Industries this Court vacated and remanded a decision by the Court of Appeals for the District of Columbia Circuit on two grounds; 1) that the Court of Appeals improperly applied the Section 20(a) LHWCA presumption in support of a claim the Claimant did not even make; and 2) that the Court of Appeals improperly categorized Claimant's injury, which occured at home in bed to be included within the statutory definition of "injury" under the Act when no credible evidence was presented that Claimant's injury arose during the course of or out of employment.

An examination of the facts at bar and the Fifth Circuit's discussion thereof, makes clear that the factual

situation in which Mr. Clymer's injury arose is totally inapposite to the facts in U. S. Industries. First, in U. S. Industries, the ALJ determined that the Claimant had fabricated the entire employment accident which he claimed resulted in his injury and that in fact, his injury arose at home in bed. No such fabrication has ever been alleged in the cause herein. In U. S. Industries no testimony was offered that the Claimant's disability was a manifestation of an earlier injury or that it was employment related. Nonetheless, the D. C. Circuit Court of Appeals erroneously relied upon a theretofore unadvanced theory of recovery that the Claimant's injury was work related even though it occurred at home.

In the case at bar, the testimony and evidence conclusively support Respondent's claim that his disability is employment-bred. The Fifth Circuit did not improperly classify Respondent's injury, advance a novel theory of recovery, or dispute the medical testimony that was offered by either side. Rather, after careful review of the record, the Court looked to Petitioner's own medical expert and determined that the record contained undisputed, conclusive evidence that the conditions of employment did aggravate Respondent's pre-existing medical condition.

The Fifth Circuit did not depart from the essential requirements of the Act. It specifically limited the scope of its review to determine only whether there was substantial evidence in the record as a whole to support the ALJ's conclusion. After careful review, the Court determined that there was not, and that the evidence was conclusively to the contrary.

Respondents also contend that the Fifth Circuit failed to require proof of a causal connection between the aggravation of Plaintiff's pre-existing condition and his employment. To the contrary, the Fifth Circuit specifically addressed causality and determined that Petitioners' own medical expert : (1) was unable to express any opinion as to the cause of Respondent's medical deterioration, and (2) did testify that conditions of his

employment, i.e. dietary and environmental influences, may have aggravated a pre-existing medical condition. As such, the uncontroverted medical testimony supported Respondent's claim that his disability was employment related. The causation requirement is met if an employee establishes an aggravation of a pre-existing condition. Luper Stevedoring of Louisiana, Inc. v. Washington, 556 F.2d 268, 271 (5th Circuit 1977); Fulks Independent Stevedor Company v. O'Leary, 357 F.2d 812, 815 (9th Circuit 1966); McKinney v. Rowe Machine Works, Inc., 2 B.R.B.S. 329, 338 (October 7, 1975); Wheatley v. Adler, 407 F.2d 307, 312 (D.C. Cir. 1968).

Contrary to Petitioner's assertion, then, the Court of Appeals did not improperly substitute its judgment for that of the fact finder but merely reviewed the record as a whole and determined that there was a lack of competent substantial evidence to support the ALJ's decision.

Petitioner's argument that the decision below conflicts with this Honorable Court's decision in U. S. Industries, is unmeritorious. In reviewing the two cases, the material dissimilarity of the respective factual situations makes evident the reason for the Fifth Circuit's rejection of Petitioner's position on this issue. As there is no conflict between the decision below and this Honorable Court's decision in U. S. Industries, certiorari review is neither necessary nor appropriate.

POINT II

The Petition for a Writ of Certiorari sets forth no substantial question of public importance nor does it present grounds for conflict jurisdiction which would warrant certiorari review.

Respondent would respectfully assert that certiorari review of the decision of the United States Court of Appeals for the Fifth Circuit would be inappropriate in this case. Where there is a conflict in decisions of various Federal Circuit Courts of Appeal, a direct conflict with a Supreme Court Mandate or an issue of great public importance, the Supreme Court has granted certiorari review. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974); Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); Pittsburg v. Alco Parking Corp., 417 U.S. 369, 94 S.Ct. 221, 41 L.Ed.2d 132 (1974); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); U. S. v. Cartwright, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973).

However, as Justice Harlan so eloquently stated in Sanks v. Georgia, 401 U.S. 144, 151, 91 S.Ct. 593, 27 L.Ed.2d 741 (1971):

> It has always been a matter of fundamental principle with this Court, a principle dictated by our very institutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity.

Respondent respectfully argues that no issue of great public importance is presented and that no conflict jurisdiction exists because the decision by the United States Court of Appeals for the Fifth Circuit is in harmony with the prior decisions of this Court and with its sister Courts of Appeal.

Likewise, Petitioners' argument regarding the timeliness of Respondent's claim is an inappropriate issue for presentment on certiorari review. The question when Respondent knew or should have known that his disability was employment related pre-

sents only a fact question and does not involve the delicate and deliberate decision making that could cause conflict between the courts of appeal. The issue was properly reviewed in detail and resolved by the 5th Circuit.

The issues presented for review by Petitioners do not involve novel questions of law or interpretations of the LHWCA. Petitioners are merely attempting to alchemize their dissatisfaction with a finding of disability in a routine worker's compensation case into a policy guise for certiorari review. Approximately five years have passed since Respondent was permanently and totally disabled by employment-bred circumstances beyond his control. Appropriate review has been sought and received, and all parties have had their day in court. Further review would be unnecessary and inappropriate particularly when this case presents no issues of great public importance which would require or justify issuance by this Court of a declarative ruling.

CONCLUSION

Respondent respectfully argues that the Petition for a Writ of Certiorari should be denied.

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Lila L. Abrams

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief has been delivered by certified mail, return receipt requested, to David W. Townend, Esq., of DeHay & Blanchard, 2300 South Tower, Plaza of the Americas, Dallas, Texas 75201, Attorneys for the Petitioners, on this 27 day of September, 1983.

Samuel L. Boyd

No. 83-388

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

E-SYSTEMS, INC.,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

HOWARD R. CLYMER,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Samuel L. Boyd
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No.

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The Respondent, Howard R. Clymer, respectfully moves pursuant to Rule 46, Rules of the Supreme Court, for leave to file the attached Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, without complying with the printing requirements of Rule 33, Rules of the Supreme Court. Respondent has not previously been granted leave to proceed in forma pauperis in any of the proceedings below, but now finds his financial position so desperate that compliance with Rule 33, Supreme Court Rules, would cause him to bear an impossible and onerous financial burden. Respondent's Affidavit in support of this Motion, in the form approved by this Court, is attached hereto and incorporated herein.

WHEREFORE, Respondent respectfully requests that this honorable Court grant his Motion for Leave to Proceed in Forma

Pauperis and accept the attached Brief in Opposition to the Petition for a Writ of Certiorari which is in compliance with Rule 39, Rules of the Supreme Court.

Respectfully submitted,

MCELROY & BOYD

By Sam Boyd
SAMUEL L. BOYD

2505 Republic Bank Tower
Dallas, Texas 75201
(214) 748-0961

ATTORNEYS FOR HOWARD R. CLYMER

AFFIDAVIT

I, Howard R. Clymer, being first duly sworn according to law, depose and say that I am the Respondent in the above entitled cause; that in support of my Motion to Proceed in Forma Pauperis requesting permission to file a typewritten Brief in Opposition to the Petition for Writ of Certiorari, I state that because of my proverty, I am unable to pay the costs involved with printing my Brief in Opposition as required by Rule 33, Supreme Court Rules; and that I believe my Brief is necessary for the Court's full and fair consideration and determination whether to grant certiorari review and that without permission to proceed in forma pauperis, I will be unable to present my Brief in Opposition to the Court.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true to the best of my knowledge and ability.

1. Are you presently employed?

ANSWER: No. My last permanent employment was with the Petitioner, E-Systems, Inc., and I received my last paycheck on March 11, 1978. At that time, my gross monthly wage was

$1,810.00.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

ANSWER: Yes. I did some painting and other light odd jobs for a neighbor in the Spring of 1983 and received $750.00.

3. Do you own any cash or checking or savings account?

ANSWER: No. I do not own any cash, checking or savings account. My wife owns a checking account, to which I do not have access, which currently has a balance of $30.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: I own a 1973 Pontiac station wagon which is in poor condition and valued at approximately $300.00. My wife and I own our own home which currently has an outstanding mortgage of $17,600.00, and my wife makes monthly mortgage payments of $271.81.

5. List of persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: I was the sole source of support for my family, but since my injury I have been unable to seek or receive gainful employment. Since that time, my wife has become employed in a clerical position and is the sole means of support for my family. My 18 year old daughter still lives at home and does not contribute to the family support or maintenance.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

H R Clymer
HOWARD R. CLYMER

SUBSCRIBED AND SWORN TO BEFORE ME by the said Howard R. Clymer, this 26th day of September, 1983, to certify which witness my hand and seal of office.

Janice A Hutchison
Notary Public, State of Texas

My Commission Expires:
11-24-84